DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket FAR 2010–0076, Sequence 7]

Federal Acquisition Regulation; Federal Acquisition Circular 2005–45; Introduction

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Summary presentation of rules.

SUMMARY: This document summarizes the Federal Acquisition Regulation (FAR) rules agreed to by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) in this Federal Acquisition Circular (FAC) 2005–45. A companion document, the *Small Entity Compliance Guide* (SECG), follows this FAC. The FAC, including the SECG, is available via the Internet at *http://www.regulations.gov.*

DATES: For effective dates see separate documents, which follow.

FOR FURTHER INFORMATION CONTACT: The analyst whose name appears in the table below in relation to each FAR case. Please cite FAC 2005–45 and the specific FAR case numbers. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755.

LIST OF RULES IN FAC 2005–45

Item	Subject	FAR case	Analyst
I	Inflation Adjustment of Acquisition—Related Thresholds	2008–024	Jackson.
II	Definition of Cost or Pricing Data	2005–036	Chambers.
III	American Recovery and Reinvestment Act of 2009 (the Recovery Act)—Buy American Requirements for Construction Materials.	2009–008	Davis.

SUPPLEMENTARY INFORMATION: Summaries for each FAR rule follow. For the actual revisions and/or amendments made by these FAR cases, refer to the specific item number and subject set forth in the documents following these item summaries.

FAC 2005–45 amends the FAR as specified below:

Item I—Inflation Adjustment of Acquisition—Related Thresholds (FAR Case 2008–024)

This final rule amends the FAR to implement section 807 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005. Section 807 requires an adjustment every 5 years of acquisition-related thresholds for inflation using the Consumer Price Index for all urban consumers, except for Davis-Bacon Act, Service Contract Act, and trade agreements thresholds. The Councils have also used the same methodology to adjust nonstatutory FAR acquisition-related thresholds in 2010.

This is the second review of FAR acquisition-related thresholds. The Councils published a proposed rule in the **Federal Register** at 75 FR 5716, February 4, 2010.

The effect of the final rule on heavily-used thresholds is the same as stated in the preamble to the proposed rule:

- The micro-purchase base threshold of $3,000 (FAR 2.101) is not changed.
- The simplified acquisition threshold (FAR 2.101) is raised from $100,000 to $150,000.
- The FedBizOpps preaward and post-award notices (Part 5) remain at $25,000 because of trade agreements.
- Commercial items test program ceiling (FAR 13.500) is raised from $5,500,000 to $6,500,000.
- The cost or pricing data threshold (FAR 15.403–4) is raised from $650,000 to $700,000.
- The prime contractor subcontracting plan (FAR 19.702) floor is raised from $550,000 to $650,000, and the construction threshold of $1,000,000 increases to $1,500,000.

Item II—Definition of Cost or Pricing Data (FAR Case 2005–036)

This final rule amends the FAR by redefining "cost or pricing data," adding a definition of "certified cost or pricing data," and changing the term "information other than cost or pricing data," to "data other than certified cost or pricing data." The rule clarifies the existing authority for contracting officers to require certified cost or pricing data or data other than certified cost or pricing data, and the existing requirements for submission of the various types of pricing data. The rule is required to eliminate confusion and misunderstanding, especially regarding the authority of the contracting officer to request data other than certified cost or pricing data when there is no other means to determine that proposed prices are fair and reasonable. Most significantly, the rule clarifies that data other than certified cost or pricing data may include the identical types of data as certified cost or pricing data but without the certification. Because the rule clarifies existing requirements, it will have only minimal impact on the Government, offerors, and automated systems.

Item III—American Recovery and Reinvestment Act of 2009 (the Recovery Act)—Buy American Requirements for Construction Materials (FAR Case 2009–008)

This final rule converts the interim rule published in the **Federal Register** at 74 FR 14623, March 31, 2009, to a final rule with changes. This final rule implements section 1605 of Division A of the American Recovery and Reinvestment Act (Recovery Act) of 2009. It prohibits the use of funds appropriated for or otherwise made available by the Recovery Act for any project for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States. Section 1605 mandates application of the Recovery Act Buy American requirement in a manner consistent with U.S. obligations under international agreements. Least developed countries continue to be treated as designated countries per congressional direction. Section 1605 also provides for waivers under certain limited circumstances.

Dated: August 18, 2010.

Edward Loeb,

Director, Acquisition Policy Division.

Amy G. Williams,

Acting Deputy Director, Defense Procurement and Acquisitions Policy (Defense Acquisition Regulations System).

Joseph A. Neurauter,

Deputy Associate Administrator and Senior Procurement Executive, Office of Acquisition Policy, U.S. General Services Administration.

Sheryl J. Goddard,

Acting Assistant Administrator for Procurement, National Aeronautics and Space Administration.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 2, 3, 5, 6, 7, 8, 12, 13, 15, 16, 17, 19, 22, 23, 28, 32, 36, 42, 50, and 52

[FAC 2005–45; FAR Case 2008–024; Item I; Docket 2010–0079, Sequence 1]

RIN 9000–AL51

Federal Acquisition Regulation; Inflation Adjustment of Acquisition—Related Thresholds

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to implement section 807 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005. Section 807 requires an adjustment every 5 years of acquisition-related thresholds for inflation using the Consumer Price Index (CPI) for all urban consumers, except for Davis-Bacon Act, Service Contract Act, and trade agreements thresholds. The Councils have also used the same methodology to adjust nonstatutory FAR acquisition-related thresholds in 2010.

DATES: *Effective Date:* October 1, 2010.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Mr. Michael Jackson, Procurement Analyst, at (202) 208–4949. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–45, FAR case 2008–024.

SUPPLEMENTARY INFORMATION:

A. Background

The first review of acquisition-related thresholds to implement section 807 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (Pub. L. 108–375) was conducted under FAR Case 2004–033 during FY 2005. The final rule for the first review was published in the **Federal Register** at 71 FR 57363, September 28, 2006. This is the second review of FAR acquisition-related thresholds. DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 75 FR 5716, February 4, 2010. The preamble to the proposed rule contained a detailed explanation of—

- What an acquisition-related threshold is;
- What acquisition-related thresholds are not subject to escalation adjustment under this case;
- How the Councils analyze statutory and nonstatutory acquisition-related thresholds; and
- The effect of this rule on the most heavily-used thresholds.

Eight respondents submitted comments on the proposed rule, which are addressed in the following section. The final rule has been coordinated with the Department of Labor and the Small Business Administration in areas of the regulation for which they are the lead agency. Any changes to Cost Accounting Standards thresholds will be dealt with under a separate case.

B. Analysis of Public Comments

1. Statutory Thresholds

a. All Statutory Thresholds

Comment: One respondent, while recognizing that this is a statutory requirement, believed that no inflation adjustments should be made at this time. The respondent views the threshold increases as a way to reduce Government oversight of Federal contracts and considers such reduction unwise, because of various congressional oversight hearings and reports of Inspectors General and the Government Accountability Office that have revealed "widespread systemic gaps in Government contracting oversight."

Response: As noted, this is a statutory requirement. Further, the intent is not to reduce Government oversight but to maintain the status quo, by adjusting thresholds to keep pace with inflation. If thresholds are not adjusted for inflation, the number of contracts subject to the acquisition-related threshold will continue to grow, because more and more contracts will be below the stated thresholds.

b. Prime Contractor Subcontracting Plan Thresholds (FAR 19.702)

Comment: One respondent stated that they were particularly pleased with the proposal to increase the threshold values in FAR part 19 relative to the need to submit an acceptable subcontracting plan. They consider the current threshold to be administratively burdensome. The respondent further recommended that the Councils should pursue legislative action to raise the threshold to a minimum of one million dollars.

Another respondent recommended increasing the prime contractor subcontracting plan threshold to $700,000, to be the same as the increased cost or pricing data threshold.

Response: The final rule raises the subcontracting threshold to $650,000, as required by the law that this case is implementing. Pursuing legislative changes is outside the scope of this case.

c. Miller Act (FAR 28.102 and 52.228–15)

Comment: Three respondents addressed the proposed increase in the Miller Act threshold. These respondents emphasized the importance of performance and payment bonds as a protection for subcontractors and taxpayers.

- One respondent stated that the law is "an unfortunate and contradictory statutory requirement." The respondent considered that the threshold increase will undermine the original protective purposes of the bonding requirements set forth in the Miller Act, because more Federal construction projects will be undertaken without the benefit of payment bond protection. In particular, this respondent noted that subcontractors are frequently small businesses, for whom lack of a payment bond may be disastrous. The respondent requested the Councils explain accurately to Congress the significant negative impact that such increases will have.
- Another respondent stated that the threshold increase is bad public policy, and the Councils should reconsider whether such thresholds are "acquisition-related thresholds" as contemplated by the Act.
- The third respondent urged the Councils not to increase the Miller Act surety bond threshold, but did not suggest rationale for noncompliance with the statutory requirement.

Response: The Councils do not agree that adjustment of thresholds for inflation will have the negative impact perceived by these respondents. As already stated, inflation adjustment of thresholds is a means of maintaining the status quo. It will not decrease the number of contracts that are subject to the Miller Act, but will prevent the relative number of contracts subject to the Miller Act from increasing. The rationale that there should be some level below which the Miller Act is not applicable is maintained by adjustment of the threshold for inflation. The law (40 U.S.C. 3132) provides alternate payment protection for contracts that exceed $30,000, so that contracts below the Miller Act threshold are not entirely without payment protection.

As to whether the Miller Act threshold is an acquisition-related threshold, this threshold clearly meets the definition that was set forth in the law, as consistently interpreted by the Councils since the enactment of the law in 2004. The law defines an acquisition-related threshold as a threshold that is set forth in law (the Miller Act), as a factor in defining the scope of the applicability of a policy, procedure, requirement, or restriction provided in that law to the procurement of property or services by an executive agency. As this definition is applied to the Miller Act threshold, the Miller Act requires payment and performance bonds when agencies acquire construction that is valued at more than the Miller Act threshold (raised by this rule from $100,000 to $150,000).

2. Nonstatutory Thresholds

Comment: One respondent was particularly concerned about the proposed increase in nonstatutory thresholds. In particular, this respondent cited three examples of threshold increases which the respondent considered questionable:

- *Approval levels for limited source justifications at FAR 8.405–6.* The respondent stated that increasing such approval levels appears inconsistent with the President's March 4, 2009, Memorandum.
- *The threshold at FAR 22.1103 for use of the solicitation provision FAR 52.222–46, Evaluation of Compensation for Professional Employees.* The respondent stated that when contractors pay very low wages and benefits, work quality can suffer and the Government may bear hidden costs because of the need to provide income assistance to low income families.
- *The threshold for subcontracting plans governed by FAR 19.702.* The respondent stated that the increase of this threshold would have a detrimental impact, especially on small businesses.

Response: Although there is no statutory requirement to increase the nonstatutory thresholds, the same rationale applies as to why escalation to adjust for inflation is a good idea. If there was any rationale for the level at which the thresholds were originally put in place by policy, the thresholds will become further and further out of line with the original policy decision if they are left unchanged. In addition to this general rationale, the Councils add the following two particular responses:

- In particular, the approval levels for limited source justifications at FAR 8.405–6 were selected to be consistent with the statutory thresholds at FAR 6.304(a). Therefore, it is reasonable to escalate these thresholds the same as the thresholds at FAR 6.304(a) to maintain the consistency.
- Although the respondent cited the threshold for subcontracting plans governed by FAR 19.702 as an example of a nonstatutory threshold, this threshold is actually a statutory threshold (15 U.S.C. 637(d)(4)), which must therefore be escalated.

3. Increase Penalties

Comment: One respondent recommended that the Councils should also increase the maximum dollar amount of penalties when increasing the acquisition-related threshold contained in the same statute. According to the respondent, by not increasing the penalty for failure to disclose unallowable activities, the Councils are providing contractors a greater incentive to violate the law.

Response: The penalties are set by statute. The law that the FAR Council is implementing did not authorize the FAR Council to increase penalties, only the acquisition-related thresholds.

4. Implementation

Two Government employees provided comments relating to the implementation of the rule.

a. Provide a Matrix

Comment: One respondent requested a matrix of the changes in order to save everyone from having to do the analysis and matrix development. (Although the comment was submitted in response to the FAR rule, the respondent requested that the Councils provide a Defense Federal Acquisition Regulation Supplement (DFARS) matrix, so this may have been intended as a comment on the DFARS inflation adjustment rule.)

Response: In 2006, the URL of a matrix was provided at FAR 1.109(d). Likewise, the current matrix is again available and the Councils have provided a revised Web address to access it.

b. Effective Date

One respondent expressed concern over the large number of systems changes that this rule will require and the difficulty of implementation in a short period of time. The respondent recommended providing ample time between the release of firm requirements and the required implementation.

Response: Although the Councils hoped to publish this final rule in time to allow 60 days for implementation, they were unable to meet that goal. The effective date of October 1, 2010, allows only a little more than the standard 30 days for implementations, but this effective date is consistent with the statutory requirements and the desired procedures for implementation of changes that impact the Federal Procurement Data System at the beginning of the fiscal year.

C. Changes Between the Proposed Rule and the Final Rule

Although there were no changes between the proposed rule and the final rule as the result of public comments, some of the thresholds changed due to lower inflation than was projected at the time of publication of the proposed rule. The proposed rule was based on a projected consumer price index (CPI) of 222 in April 2010. The final rule is based on an actual CPI of 217.631 through the end of March 2010. The end of March, 6 months before the effective date of the rule, is used as the cutoff in order to allow time for approval and publication of the final rule.

Because the actual CPI is more than 4 points lower than the projected CPI, proposed thresholds of at least $13 million are generally proportionally lower. Thresholds of less than $13 million were generally unchanged, due to rounding.

The effect of the final rule on heavily-used thresholds is the same as stated in the preamble to the proposed rule:

- The micro-purchase base threshold of $3,000 (FAR 2.101) is not changed.
- The simplified acquisition threshold (FAR 2.101) is raised from $100,000 to $150,000.
- The FedBizOpps preaward and post-award notices (FAR part 5) remain at $25,000 because of trade agreements.
- Commercial items test program ceiling (FAR 13.500) is raised from $5,500,000 to $6,500,000.

• The cost or pricing data threshold (FAR 15.403–4) is raised from $650,000 to $700,000.

• The prime contractor subcontracting plan (FAR 19.702) floor is raised from $550,000 to $650,000, and the construction threshold of $1,000,000 increases to $1,500,000.

This final rule is a significant regulatory action and, therefore, was subject to review under section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

D. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* because the adjustment of acquisition-related thresholds for inflation maintains the status quo. The Councils note that the set-aside threshold of $100,000 increases to $150,000, which is not a detriment to small business. Although several respondents were concerned about the impact of some of the threshold changes on small businesses (see comment and response at B.1.c. and B.2.), the Councils reiterate that adjusting a threshold in an amount sufficient to keep pace with current inflation is neutral in impact on small businesses because it just maintains the status quo.

E. Paperwork Reduction Act

The Paperwork Reduction Act does apply; however, these changes to the FAR do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Numbers:

• 9000–0006, Subcontracting Plans/ Subcontracting Report for Individual Contract (SF 294)—FAR Sections Affected: Subpart 19.7 and 52.219–9;

• 9000–0007, Summary Subcontract Report—FAR Sections Affected: Subpart 19.7, 53.219, and SF 295;

• 9000–0013, Cost or Pricing Data Exemption—FAR Sections Affected: Subparts 15.4, 42.7, 52.214–28, 52.215–12, 52.215–13, 52.215–20, and 52.215–21;

• 9000–0018, Certification of Independent Price Determination and Parent Company and Identifying Data—FAR Sections Affected: 3.103 and 3.302;

• 9000–0022, Duty-Free Entry—FAR 48 CFR 52.225–8—FAR Section Affected: 52.225–8;

• 9000–0026, Change Order Accounting—FAR Sections Affected: 43.205(f) and 52.243–6;

• 9000–0027, Value Engineering Requirements—FAR Sections Affected: Subparts 48.1 and 48.2, 52.248–1, 52.248–2, and 52.248–3;

• 9000–0034, Examination of Records 5 CFR 1320.5(b) by Comptroller General and Contract Audit—FAR Sections Affected: 52.215–2, 52.212–5, and 52.214–26;

• 9000–0045, Bid, Performance, and Payment Bonds—FAR Sections Affected: Subparts 28.1 and 28.2, 52.228–1, 52.228–2, 52.228–13, 52.228–15, and 52.228–16;

• 9000–0058, Schedules for Construction Contracts—FAR Section Affected: 52.236–15;

• 9000–0060, Accident Prevention 48 CFR 52.236–13, Plans and Recordkeeping—FAR Section Affected: 52.236–13;

• 9000–0066, Professional Employee Compensation Plan—FAR Sections Affected: Subpart 22.11 and 52.222–46;

• 9000–0073, Advance Payments—FAR Sections Affected: Subpart 32.4 and 52.232–12;

• 9000–0077, Quality Assurance Requirements—FAR Sections Affected: Subparts 46.1 through 46.3, 52.246–2 through 52.246–8, 52.246–10, 52.246–12, and 52.246–15;

• 9000–0080, Integrity of Unit Prices—FAR Sections Affected: 15.408(f) and 52.215–14;

• 9000–0091, Anti-Kickback Procedures—FAR Sections Affected: 3.502, and 52.203–7;

• 9000–0094, Debarment and Suspension, FAR Sections Affected: 9.1, 9.4, 52.209–5, and 52.212–3(h);

• 9000–0101, Drug-Free Workplace—FAR Section Affected: 52.223–6(b)(5);

• 9000–0115, Notification of Ownership Changes—FAR Sections Affected: 15.408(k) and 52.215–19;

• 9000–0133, Defense Production Act Amendments—FAR Sections Affected: 34.1 and 52.234–1;

• 9000–0134, Environmentally Sound Products—FAR Sections Affected: 23.406 and 52.223–4;

• 9000–0135, Prospective Subcontractor Requests for Bonds, FAR 28.106–4(b), 52.228–12;

• 1215–0072, OFCCP Recordkeeping and Reporting Requirements—Supply and Service; and

• 1215–0119, Requirements of a Bona Fide Thrift or Savings Plan (29 CFR part 547) and Requirements of a Bona Fide Profit-Sharing Plan or Trust (29 CFR part 549).

List of Subjects in 48 CFR Parts 1, 2, 3, 5, 6, 7, 8, 12, 13, 15, 16, 17, 19, 22, 23, 28, 32, 36, 42, 50, and 52

Government procurement.

Dated: August 18, 2010.

Edward Loeb,

Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 1, 2, 3, 5, 6, 7, 8, 12, 13, 15, 16, 17, 19, 22, 23, 28, 32, 36, 42, 50, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 1, 2, 3, 5, 6, 7, 8, 12, 13, 15, 16, 17, 19, 22, 23, 28, 32, 36, 42, 50, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

1.109 [Amended]

■ 2. Amend section 1.109 by removing from paragraph (d) "*http://acquisition.gov/far/facsframe.html*" and adding "*http://www.regulations.gov* (search FAR case 2008–024)" in its place.

PART 2—DEFINITIONS OF WORDS AND TERMS

2.101 [Amended]

■ 3. Amend section 2.101 in paragraph (b)(2) by—

■ a. Amending the definition "Major system" by removing from paragraph (1) "$173.5 million" and adding "$189.5 million", and removing "$814.5 million" and adding "$890 million"; and removing from paragraph (2) "$1.8 million" and adding "$2 million" in its place;

■ b. Amending the definition "Micro-purchase threshold" by removing from paragraph (3)(ii) "$25,000" and adding "$30,000" in its place; and

■ c. Amending the definition "Simplified acquisition threshold" by removing from the introductory paragraph "$100,000" and adding "$150,000" in its place; and removing from paragraph (1) "$250,000" and adding "$300,000" in its place.

PART 3—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

3.502–2 [Amended]

■ 4. Amend section 3.502–2 by removing from the introductory text of paragraph (i) "$100,000" and adding "$150,000" in its place.

3.804 [Amended]

■ 5. Amend section 3.804 by removing "$100,000" and adding "$150,000" in its place.

3.808 [Amended]

■ 6. Amend section 3.808 by removing from paragraphs (a) and (b) "$100,000" and adding "$150,000" in its place.

PART 5—PUBLICIZING CONTRACT ACTIONS

5.101 [Amended]

■ 7. Amend section 5.101 by removing from the introductory text of paragraph (a)(2) "$10,000" and adding "$15,000" in its place.

5.205 [Amended]

■ 8. Amend section 5.205 by removing from paragraph (d)(2) "$10,000" and adding "$15,000" in its place.

5.206 [Amended]

■ 9. Amend section 5.206 by—
■ a. Removing from paragraph (a)(1) "$100,000" and adding "$150,000" in its place; and
■ b. Removing from paragraph (a)(2) "$100,000" and adding "$150,000" in its place, and removing "$10,000" and adding "$15,000" in its place.

5.303 [Amended]

■ 10. Amend section 5.303 by removing from the introductory text of paragraph (a) "$3.5 million" and adding "$4 million" in its place.

PART 6—COMPETITION REQUIREMENTS

6.304 [Amended]

■ 11. Amend section 6.304 by—
■ a. Removing from paragraph (a)(1) "$550,000" and adding "$650,000" in its place;
■ b. Removing from paragraph (a)(2) "$550,000" and adding "$650,000" in its place, and removing "$11.5 million" and adding "$12.5 million" in its place;
■ c. Removing from the introductory text of paragraph (a)(3) "$11.5 million" and adding "$12.5 million" in its place, removing "$57 million" and adding "$62.5 million" in its place, and removing "$78.5 million" and adding "$85.5 million" in its place; and
■ d. Removing from paragraph (a)(4) "$57 million" and adding "$62.5 million" in its place, and removing "$78.5 million" and adding "$85.5 million" in its place.

PART 7—ACQUISITION PLANNING

7.104 [Amended]

■ 12. Amend section 7.104 by—
■ a. Removing from paragraph (d)(2)(i)(A) "$7.5 million" and adding "$8 million" in its place;
■ b. Removing from paragraph (d)(2)(i)(B) "$5.5 million" and adding "$6 million" in its place; and
■ c. Removing from paragraph (d)(2)(i)(C) "$2 million" and adding "$2.5 million" in its place.

7.107 [Amended]

■ 13. Amend section 7.107 by—
■ a. Removing from paragraph (b)(1) "$86 million" and adding "$94 million" in its place; and
■ b. Removing from paragraph (b)(2) "$8.6 million" and adding "$9.4 million" in its place, and removing "$86 million" and adding "$94 million" in its place.

PART 8—REQUIRED SOURCES OF SUPPLIES AND SERVICES

8.405–6 [Amended]

■ 14. Amend section 8.405–6 by—
■ a. Removing from paragraph (h)(1) "$550,000" and adding "$650,000" in its place;
■ b. Removing from paragraph (h)(2) "$550,000" and adding "$650,000" in its place, and removing "$11.5 million" and adding "$12.5 million" in its place;
■ c. Removing from the introductory text of paragraph (h)(3) "$11.5 million" and adding "$12.5 million" in its place, removing "$57 million" and adding "$62.5 million" in its place, and removing "$78.5 million" and adding "$85.5 million" in its place; and
■ d. Removing from paragraph (h)(4) "$57 million" and adding "$62.5 million" in its place, and removing "$78.5 million" and adding "$85.5 million" in its place.

PART 12—ACQUISITION OF COMMERCIAL ITEMS

12.102 [Amended]

■ 15. Amend section 12.102 by removing from the introductory text of paragraph (f)(2) "$16 million" and adding "$17.5 million" in its place; and removing from paragraph (g)(1)(ii) "$27 million" and adding "$29.5 million" in its place.

12.203 [Amended]

■ 16. Amend section 12.203 by removing "$5.5 million" and adding "$6.5 million" in its place, and removing "$11 million" and adding "$12 million" in its place.

PART 13—SIMPLIFIED ACQUISITION PROCEDURES

13.000 [Amended]

■ 17. Amend section 13.000 by removing "$5.5 million" and adding "$6.5 million" in its place, and removing "$11 million" and adding "$12 million" in its place.

13.003 [Amended]

■ 18. Amend section 13.003 by—
■ a. Removing from paragraph (b)(1) "$100,000" and adding "$150,000" in its place, and removing "$250,000" and adding "$300,000" in its place;
■ b. Removing from paragraph (c)(1)(ii) "$5.5 million" and adding "$6.5 million" in its place, and removing "$11 million" and adding "$12 million" in its place; and
■ c. Removing from paragraph (g)(2) "$5.5 million" and adding "$6.5 million", and removing "$11 million" and adding "$12 million" in its place.

13.005 [Amended]

■ 19. Amend section 13.005 by removing from paragraph (a)(5) "$100,000" and adding "$150,000" in its place.

13.201 [Amended]

■ 20. Amend section 13.201 by removing from paragraph (g)(1)(ii) "$25,000" and adding "$30,000" in its place.

13.303–5 [Amended]

■ 21. Amend section 13.303–5 by—
■ a. Removing from paragraph (b)(1) "$5.5 million" and adding "$6.5 million" in its place, and removing "$11 million" and adding "$12 million" in its place; and
■ b. Removing from paragraph (b)(2) "$5.5 million" and adding "$6.5 million" in its place, and removing "$11 million" and adding "$12 million" in its place.

13.500 [Amended]

■ 22. Amend section 13.500 by—
■ a. Removing from paragraph (a) "$5.5 million" and adding "$6.5 million" in its place, and removing "$11 million" and adding "$12 million" in its place; and
■ b. Removing from the introductory text of paragraph (e) "$11 million" and adding "$12 million" in its place.

13.501 [Amended]

■ 23. Amend section 13.501 by—
■ a. Removing from paragraph (a)(2)(i) "$100,000" and adding "$150,000" in its place, and removing "$550,000" and adding "$650,000" in its place;
■ b. Removing from paragraph (a)(2)(ii) "$550,000" and adding "$650,000" in its place, and removing "$11.5 million" and adding "$12.5 million" in its place;
■ c. Removing from paragraph (a)(2)(iii) "$11.5 million" and adding "$12.5 million" in its place, removing "$57 million" and adding "$62.5 million" in its place, and removing "$78.5 million" and adding "$85.5 million" in its place; and
■ d. Removing from paragraph (a)(2)(iv) "$57 million" and adding "$62.5 million" in its place, and removing "$78.5 million" and adding "$85.5 million" in its place.

PART 15—CONTRACTING BY NEGOTIATION

15.304 [Amended]

■ 24. Amend section 15.304 by removing from paragraph (c)(4) "$550,000" and adding "$650,000" in its place, and by removing "$1,000,000" and adding "$1.5 million" in its place.

15.403–1 [Amended]

■ 25. Amend section 15.403–1 by removing from paragraph (c)(3)(iv) "$16 million" and adding "$17.5 million" in its place.

15.403–4 [Amended]

■ 26. Amend section 15.403–4 by removing from the introductory texts of paragraphs (a)(1) and (a)(1)(iii) "$650,000" and adding "$700,000" in its place.

15.404–3 [Amended]

■ 27. Amend section 15.404–3 by removing from paragraph (c)(1)(i) "$11.5 million" and adding "$12.5 million" in its place.

15.407–2 [Amended]

■ 28. Amend section 15.407–2 by removing from paragraph (c)(1) and the introductory text of paragraph (c)(2) "$11.5 million" and adding "$12.5 million" in its place.

15.408 [Amended]

■ 29. Amend section 15.408 in Table 15–2, "II. Cost Elements" which follows paragraph (n), by removing from paragraph "A(2)" "$11.5 million" and adding "$12.5 million" in its place.

PART 16—TYPES OF CONTRACTS

16.206–2 [Amended]

■ 30. Amend section 16.206–2 by removing from the introductory paragraph "$100,000" and adding "$150,000" in its place.

16.206–3 [Amended]

■ 31. Amend section 16.206–3 by removing from paragraph (a) "$100,000" and adding "$150,000" in its place.

16.207–3 [Amended]

■ 32. Amend section 16.207–3 by removing from paragraph (d) "$100,000" and adding "$150,000" in its place.

16.503 [Amended]

■ 33. Amend section 16.503 by removing from paragraph (b)(2) "$100 million" and adding "$103 million" in its place; and removing from paragraph (d)(1) "$11.5 million" and adding "$12.5 million" in its place.

16.504 [Amended]

■ 34. Amend section 16.504 by removing from the introductory texts of paragraphs (c)(1)(ii)(D)(*1*) and (c)(1)(ii)(D)(*3*) "$100 million" and adding "$103 million" in its place; and removing from the introductory text of paragraph (c)(2)(i) "$11.5 million" and adding "$12.5 million" in its place.

16.506 [Amended]

■ 35. Amend section 16.506 by removing from paragraphs (f) and (g) "$11.5 million" and adding "$12.5 million" in its place.

PART 17—SPECIAL CONTRACTING METHODS

17.108 [Amended]

■ 36. Amend section 17.108 by removing from paragraph (a) "$11.5 million" and adding "$12.5 million" in its place; and removing from paragraph (b) "$114.5 million" and adding "$125 million" in its place.

PART 19—SMALL BUSINESS PROGRAMS

19.502–2 [Amended]

■ 37. Amend section 19.502–2 by—
■ a. Removing from paragraph (a) "$100,000" and adding "$150,000" in its place each time it appears (twice), and removing "$250,000" and adding "$300,000" in its place; and
■ b. Removing from paragraph (b) "$100,000" and adding "$150,000" in its place.

19.508 [Amended]

■ 38. Amend section 19.508 by removing from paragraph (e) "$100,000" and adding "$150,000" in its place.

19.702 [Amended]

■ 39. Amend section 19.702 by—
■ a. Removing from paragraph (a)(1) "$550,000" and adding "$650,000" in its place, and removing "$1,000,000" and adding "$1.5 million" in its place; and
■ b. Removing from paragraph (a)(2) "$550,000" and adding "$650,000" in its place, and removing "$1,000,000" and adding "$1.5 million" in its place.

19.704 [Amended]

■ 40. Amend section 19.704 by removing from paragraph (a)(9) "$550,000" and adding "$650,000" in its place, and removing "$1,000,000" and adding "$1.5 million" in its place.

19.708 [Amended]

■ 41. Amend section 19.708 by removing from paragraph (b)(1) "$550,000" and adding "$650,000" in its place, and removing "$1,000,000" and adding "$1.5 million" in its place.

19.805–1 [Amended]

■ 42. Amend section 19.805–1 by removing from paragraph (a)(2) "$5.5 million" and adding "$6.5 million" in its place, and removing "$3.5 million" and adding "$4 million" in its place.

19.1202–2 [Amended]

■ 43. Amend section 19.1202–2 by removing from paragraph (a) "$550,000" and adding "$650,000" in its place, and removing "$1,000,000" and adding "$1.5 million" in its place.

19.1306 [Amended]

■ 44. Amend section 19.1306 by removing from paragraph (a)(2)(i) "$5.5 million" and adding "$6.5 million" in its place; and removing from paragraph (a)(2)(ii) "$3.5 million" and adding "$4 million" in its place.

19.1406 [Amended]

■ 45. Amend section 19.1406 by removing from paragraph (a)(2)(i) "$5.5 million" and adding "$6 million" in its place; and removing from paragraph (a)(2)(ii) "$3 million" and adding "$3.5 million" in its place.

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

22.305 [Amended]

■ 46. Amend section 22.305 by removing from paragraph (a) "$100,000" and adding "$150,000" in its place.

22.602 [Amended]

■ 47. Amend section 22.602 by removing "$10,000" and adding "$15,000" in its place.

22.603 [Amended]

■ 48. Amend section 22.603 by removing from paragraph (b) "$10,000" and adding "$15,000" in its place.

22.605 [Amended]

■ 49. Amend section 22.605 by removing from paragraphs (a)(1), (a)(2), (a)(3), and (a)(5) "$10,000" and adding "$15,000" in its place each time it appears (six times).

22.1103 [Amended]

■ 50. Amend section 22.1103 by removing "$550,000" and adding "$650,000" in its place.

22.1402 [Amended]

■ 51. Amend section 22.1402 by removing from paragraph (a) "$10,000" and adding "$15,000" in its place.

22.1408 [Amended]

■ 52. Amend section 22.1408 by removing from the introductory text of paragraph (a) "$10,000" and adding "$15,000" in its place.

PART 23—ENVIRONMENT, ENERGY AND WATER EFFICIENCY, RENEWABLE ENERGY TECHNOLOGIES, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

23.406 [Amended]

■ 53. Amend section 23.406 by removing from paragraph (d) "$100,000" and adding "$150,000" in its place.

PART 28—BONDS AND INSURANCE

28.102–1 [Amended]

■ 54. Amend section 28.102–1 by removing from paragraphs (a) and (b)(1) "$100,000" and adding "$150,000" in its place.

28.102–2 [Amended]

■ 55. Amend section 28.102–2 by removing from the headings of paragraphs (b) and (c) "*$100,000*" and adding "*$150,000*" in its place.

28.102–3 [Amended]

■ 56. Amend section 28.102–3 by removing from paragraphs (a) and (b) "$100,000" and adding "$150,000" in its place.

PART 32—CONTRACT FINANCING

32.404 [Amended]

■ 57. Amend section 32.404 by removing from paragraph (a)(7)(i) "$10,000" and adding "$15,000" in its place.

PART 36—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

36.501 [Amended]

■ 58. Amend section 36.501 by removing from paragraph (b) "$1,000,000" and adding "$1.5 million" in its place each time it appears (twice).

PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES

42.709 [Amended]

■ 59. Amend section 42.709 by removing from paragraph (b) "$650,000" and adding "$700,000" in its place.

42.709–6 [Amended]

■ 60. Amend section 42.709–6 by removing "$650,000" and adding "$700,000" in its place.

42.1502 [Amended]

■ 61. Amend section 42.1502 by removing from paragraph (e) "$550,000" and adding "$650,000" in its place each time it appears (twice).

PART 50—EXTRAORDINARY CONTRACTUAL ACTIONS AND THE SAFETY ACT

50.102–1 [Amended]

■ 62. Amend section 50.102–1 by removing from paragraph (b) "$55,000" and adding "$65,000" in its place.

50.102–3 [Amended]

■ 63. Amend section 50.102–3 by removing from paragraph (b)(4) "$28.5 million" and adding "$31.5 million" in its place; and removing from paragraphs (e)(1)(i) and (e)(1)(ii) "$55,000" and adding "$65,000" in its place.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

52.203–7 [Amended]

■ 64. Amend section 52.203–7 by removing from the clause heading "(July 1995)" and adding "(Oct 2010)" in its place; and removing from paragraph (c)(5) "$100,000" and adding "$150,000" in its place.

52.203–12 [Amended]

■ 65. Amend section 52.203–12 by removing from the clause heading "(Sep 2007)" and adding "(Oct 2010)" in its place; and removing from paragraphs (g)(1) and (g)(3) "$100,000" and adding "$150,000" in its place.

52.204–8 [Amended]

■ 66. Amend section 52.204–8 by removing from the provision heading "(Feb 2009)" and adding "(Oct 2010)" in its place; and removing from paragraph (c)(1)(ii) "$100,000" and adding "$150,000" in its place.

52.212–3 [Amended]

■ 67. Amend section 52.212–3 by removing from the provision heading "(Aug 2009)" and adding "(Oct 2010)" in its place; and removing from paragraph (e) "$100,000" and adding "$150,000" in its place.

52.212–5 [Amended]

■ 68. Amend section 52.212–5 by—
■ a. Removing from the clause heading "(Jul 2010)" and adding "(Oct 2010)" in its place;
■ b. Removing from paragraph (b)(12)(i) "(Apr 2008)" and adding "(Oct 2010)" in its place;
■ c. Removing from paragraph (b)(25) "(Jun 1998)" and adding "(Oct 2010)" in its place;
■ d. Removing from paragraph (e)(1)(ii) "$550,000" and adding "$650,000" in its place, and removing "$1,000,000" and adding "$1.5 million" in its place;
■ e. Removing from paragraph (e)(1)(vi) "(Jun 1998)" and adding "(Oct 2010)" in its place; and
■ f. In Alternate II by—
■ 1. Removing from the Alternate heading "(*Apr 2010*)" and adding "(*Oct 2010*)" in its place;
■ 2. Removing from paragraph (e)(1)(ii)(C) "$550,000" and adding "$650,000" in its place, and removing "$1,000,000" and adding "$1.5 million" in its place; and
■ 3. Removing from paragraph (e)(1)(ii)(F) "(June 1998)" and adding "(Oct 2010)" in its place.

52.213–4 [Amended]

■ 69. Amend section 52.213–4 by—
■ a. Removing from the clause heading "(Jul 2010)" and adding "(Oct 2010)" in its place;
■ b. Removing from paragraph (a)(2)(vii) "(Jun 2010)" and adding "(Oct 2010)" in its place;
■ c. Removing from paragraph (b)(1)(ii) "(Dec 1996)" and adding "(Oct 2010)" in its place, and removing "$10,000" and adding "$15,000" in its place; and
■ d. Removing from paragraph (b)(1)(iv) "(June 1998)" and adding "(Oct 2010)" in its place, and removing "$10,000" and adding "$15,000" in its place.

52.219–9 [Amended]

■ 70. Amend section 52.219–9 by—
■ a. Removing from the clause heading "(Jul 2010)" and adding "(Oct 2010)" in its place;
■ b. Removing from paragraph (d)(9) "$550,000" and adding "$650,000" in its place, and removing "$1,000,000" and adding "$1.5 million" in its place;
■ c. Removing from the introductory text of paragraph (d)(11)(iii) "$100,000" and adding "$150,000" in its place; and
■ d. Removing from paragraph (l)(2)(i)(C) "$550,000" and adding "$650,000" in its place, and removing "$1,000,000" and adding "$1.5 million" in its place.

52.222–20 [Amended]

■ 71. Amend section 52.222–20 by removing from the clause heading "(Dec 1996)" and adding "(Oct 2010)" in its place; and removing from the introductory paragraph "$10,000" and adding "$15,000" in its place.

52.222–36 [Amended]

■ 72. Amend section 52.222–36 by removing from the clause heading "(Jun 1998)" and adding "(Oct 2010)" in its place; and removing from paragraph (d) "$10,000" and adding "$15,000" in its place.

52.225–8 [Amended]

■ 73. Amend section 52.225–8 by removing from the clause heading "(Feb 2000)" and adding "(Oct 2010)" in its place; and removing from the introductory texts of paragraphs (c)(1)

and (j)(2) "$10,000" and adding "$15,000" in its place.

52.228–15 [Amended]

■ 74. Amend section 52.228–15 by removing from the clause heading "(Nov 2006)" and adding "(Oct 2010)" in its place; and removing from the introductory text of paragraph (b) "$100,000" and adding "$150,000" in its place.

52.244–6 [Amended]

■ 75. Amend section 52.244–6 by—
■ a. Removing from the clause heading "(Jun 2010)" and adding "(Oct 2010)" in its place;
■ b. Removing from paragraph (c)(1)(iii) "$550,000" and adding "$650,000" in its place, and removing "$1,000,000" and adding "$1.5 million" in its place; and
■ c. Removing from paragraph (c)(1)(vi) "(Jun 1998)" and adding "(Oct 2010)" in its place.

52.248–1 [Amended]

■ 76. Amend section 52.248–1 by removing from the clause heading "(Feb 2000)" and adding "(Oct 2010)" in its place; and removing from paragraph (l) "$100,000" and adding "$150,000" in its place.

52.248–3 [Amended]

■ 77. Amend section 52.248–3 by removing from the clause heading "(Sep 2006)" and adding "(Oct 2010)" in its place; and removing from paragraph (h) "$55,000" and adding "$65,000" in its place.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 4, 12, 14, 15, 16, 19, 27, 30, 31, 32, 42, 44, 49, and 52

[FAC 2005–45; FAR Case 2005–036; Item II; Docket 2007–0001, Sequence 15]

RIN 9000–AK74

Federal Acquisition Regulation; Definition of Cost or Pricing Data

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to clarify the distinction between "certified cost or pricing data" and "data other than certified cost or pricing data", and to clarify requirements for submission of cost or pricing data.

DATES: *Effective Date:* October 1, 2010.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Mr. Edward N. Chambers, Procurement Analyst, at (202) 501–3221. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–45, FAR case 2005–036.

SUPPLEMENTARY INFORMATION:

A. Background

Subpart 15.4 of the FAR describes the contracting officer's responsibility to purchase supplies and services at fair and reasonable prices and the use of data and information in meeting this requirement. This subpart incorporates the requirements of the Truth In Negotiations Act (TINA), 10 U.S.C. 2306a and 41 U.S.C. 254b, which address the requirements for the submission of cost or pricing data and the circumstances under which a contractor must certify to their accuracy, completeness, and currency.

The Councils believe that the implementation of TINA in FAR subpart 15.4 is not sufficiently clear. In particular, there is confusion regarding the right of the Government to request "data other than certified cost or pricing data," the obligation of the offeror to provide this data, and the definition of this term.

This lack of clarity is due, in large part, to definitions that overlap and are not identical to TINA. For example, the term "cost or pricing data" is defined in the FAR to mean certified cost or pricing data, whereas TINA does not make certification part of the definition of this term. This regulatory refinement has led to confusion regarding the level of information that a contracting officer may request to establish fair and reasonable pricing including a misunderstanding by some that the data elements that comprise cost or pricing data cannot be requested by the Government unless the data are required by law to be submitted to the contracting officer in a certified form. This confusion has been exacerbated by the FAR's use of the phrase "information other than cost or pricing data," which has made it difficult for contracting officers to understand the circumstances when data other than certified cost or pricing data should be obtained to protect the Government from paying unreasonable prices.

Even the basic articulation of policy regarding the use of data to establish the fairness and reasonableness of offered prices in the introductory paragraph of FAR 15.402(a) has lacked a certain level of clarity that creates uncertainty. For many years, this paragraph has appropriately cautioned contracting officers not to obtain more information than is necessary—and the FAR must continue to do so. However this paragraph should also, but currently does not, expressly mention the underlying statutory authority to collect "data other than certified cost or pricing data." Because of this omission, some contracting officers may be under the misperception that there is a greater responsibility to avoid asking unnecessarily for the submission of cost or pricing data than there is, in the first instance, to determine whether and how much of this data may be required, in a given case, to establish price fairness and reasonableness. In fact, both responsibilities—*i.e.,* obtaining data that are adequate for evaluating the reasonableness of the price and taking appropriate care not to ask for more data than is necessary—are inextricably interrelated and equally important. As such, the FAR needs to communicate this message more clearly.

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 72 FR 20092, April 23, 2007, to revise the FAR definition of "cost or pricing data"; change the term "information other than cost or pricing data" to "data other than certified cost or pricing data"; add a definition of "certified cost or pricing data" to make the terms and definitions consistent with TINA and more understandable to the general reader; change terminology throughout the FAR; and clarify the need for contracting officers to obtain "data other than certified cost or pricing data" when there is no other means to determine fair and reasonable pricing during price analysis.

Based on comments received on the proposed rule, a public meeting held on November 1, 2007, and additional deliberations (which are all discussed in greater detail below), the Councils have adopted a final rule that—

• Clarifies terminology used in the FAR to make it consistent with TINA, resulting in (i) refinements to the regulatory definition of cost or pricing data, (ii) the addition of a definition for "certified cost or pricing data," (iii) the addition of a definition for "data other than certified cost or pricing data," and

(iv) deletion of the phrase "information other than cost or pricing data";

• Clarifies responsibilities regarding the request for, and submission of, "data other than certified cost or pricing data" to establish fair and reasonable pricing, both in the case when "certified cost or pricing data" is required and is not required;

• Retains the current order of preference for determining the type of cost or pricing data required to establish fair and reasonable prices when certified cost or pricing data are not required;

• Retains and reinforces important statements to explain why contracting officers must not require, unnecessarily, the submission of "data other than certified cost or pricing data";

• Clarifies the instructions for offerors preparing a contract pricing proposal when cost or pricing data are required so that such instructions are consistent with the clarified terminology and policies for determining the type and quantity of data necessary to establish a fair and reasonable price; and

• Supplements existing coverage to clarify current coverage and achieve greater understanding by contracting officers and contractors.

This rule neither expands nor diminishes the existing rights of contracting officers to request cost or pricing data (whether certified or other than certified) or other information, or the existing responsibilities of the offeror to submit such data or other information. Similarly, the rule does not require, encourage, or authorize contracting officers to obtain cost or pricing data or other information unless it is needed to determine that prices offered are fair and reasonable, which may include the request for such data in connection with a cost realism analysis. As the rule explains, requiring contractors to submit more data than what is needed can "lead to increased proposal preparation costs, generally extend acquisition lead time, and consume additional contractor and Government resources."

Whether a contractor must submit "certified cost or pricing data" is based on the requirements of TINA and its stated exceptions. With respect to "data other than certified cost or pricing data," the introductory policy statement in FAR 15.402(a) has been clarified to tie together the contracting officer's longstanding statutory responsibility to request the data and information necessary to establish a fair and reasonable price—as stated in TINA at 10 U.S.C. 2306a(d)(1) and 41 U.S.C. 254b(d)(1)—with the caution that, in doing so, the contracting officer must not request more data than is necessary. By doing so, the FAR will provide a more complete articulation of the policy underlying the use of "data other than certified cost or pricing data" in establishing price fairness and reasonableness, in furtherance of the contracting officer's duty to serve as a responsible steward of the taxpayer's resources.

B. Public Comments

The first comment period closed on June 22, 2007. Comments were received from 11 respondents. As a result of the comments received, a public meeting was scheduled with notice provided at 72 FR 61854 on November 1, 2007. The public meeting was held on November 15, 2007, and was followed by a one week period for submission of additional comments. Several respondents submitted additional comments. The public comments are addressed in the following analysis:

General Comments

Some respondents noted that the proposed changes should alleviate confusion. Others raised the following general concerns regarding various aspects of the proposed rule.

1. Some respondents were concerned that the proposed rule will result in contracting officers by-passing normal market research and pricing techniques and require contractors to submit full cost or pricing data as if the Truth in Negotiations Act (TINA) applied.

Response: The current FAR, as well as the proposed and final rule, protect against this practice. Contracting officers must generally follow the order of preference at FAR 15.402, and are required by that section to "obtain the type and quantity of data necessary to establish a fair and reasonable price, but not more data than is necessary." In theory, this could include all of the elements prescribed under FAR 15.408, Table
15–2. However, in most cases the data necessary for a contracting officer to determine cost fairness and reasonableness, or cost realism, will fall short of this level of data. The rule should not result in contracting officers requiring contractors to submit full cost or pricing data as if certification will be required when it is not necessary.

2. Public comments did point out an error where the proposed rule changed the FAR to require certified cost or pricing data "and" data other than certified cost or pricing data.

Response: The final rule corrects several instances where "and" was incorrectly used, replacing it with "or". However, there are circumstances where "and" is appropriate and those have been retained. The final rule recognizes that the contracting officer may need to request data other than certified cost or pricing data, in addition to certified cost or pricing data, to establish fair and reasonable pricing.

3. Some respondents were concerned about the broadening of the definition of "information other than cost or pricing data" by adding the words "and judgmental information."

Response: Data used to support an offer will necessarily contain some information that is non-factual, *i.e.,* judgmental information. Due to its nature, judgmental information cannot be certified. Even in situations where "certified cost or pricing data" are required, judgmental information is not certified, and it is part of "data other than certified cost or pricing data" that supplements certified cost or pricing data. The final rule deletes the phrase "information other than cost or pricing data," but includes "judgmental information" and "judgmental factors" in the definition of "data other than certified cost or pricing data." The final rule also includes additional language to provide consistency with FAR 15.408, Table 15–2 (*i.e.,* any information reasonably required to explain the estimating process, including the judgmental factors applied and the mathematical or other methods used in the estimate, including those used in projecting from known data; and the nature and amount of any contingencies included in the proposed price). Aligning the definition of "data other than certified cost or pricing data" and the text of the language in FAR 15.408, Table 15–2, keeps the definition consistent with the current FAR requirements and TINA. The Councils note that the existence of a judgment is factual, but the nature and amount of the judgment are not.

4. Many respondents were concerned that the proposed rule inappropriately adds the phrase "data other than certified cost or pricing data" throughout the proposed rule when only certified cost or pricing data apply.

Response: The final rule deletes that addition in some instances. There are other instances where both phrases: "Certified cost or pricing data" and "data other than certified cost or pricing data" are applicable. See the response to General Comments number 2.

5. Several respondents were concerned that offerors of commercial items would be required to submit cost data in all instances.

Response: Such an outcome would be contrary to the intent of the rule, which does not alter the current intent of the

FAR regarding the type and quantity of data to determine if the price of a commercial item is fair and reasonable. FAR 15.403–1(c)(3) specifically exempts commercial items from certified cost or pricing data requirements, and this rule does not change that exception. Also, FAR 15.403–3(c)(2) sets limitations on the type of cost data or pricing data that can be requested regarding commercial items. When contracting officers determine that they can use price analysis to determine the price to be fair and reasonable, the order of preference at FAR 15.402 means cost data will generally not be obtained for pricing commercial items. Contracting officers are to obtain only that information needed to determine a fair and reasonable price, which, in some cases, may include contractor cost data (without certification) for commercial items.

Specific Comments

1. Comment: Add a definition of "cost data," which is referenced at FAR 15.402(a)(2)(ii).

Response: We do not believe a separate definition is required. The revised definition of "data other than certified cost or pricing data" and the existing definition of "information other than cost or pricing data" both encompass cost data and pricing data depending on what is needed by the contracting officer, using the order of preference at FAR 15.402(a). The definition simply breaks out various aspects of "data other than certified cost or pricing data." The cost data refers to data related to a contractor's costs.

2. Comment: Separate enumeration of "cost or pricing data" in FAR 4.803(a)(17)(i) "Content of Contract Files" is unnecessary because it is repetitive with existing definitions in FAR 2.101.

Response: The final rule revises FAR 4.803(a)(17)(i) to read "certified cost or pricing data" consistent with the revised definition. The requirement at FAR 4.803(a)(17) is for documenting the contract file for the contracting officer's determination of a fair and reasonable price, and lists the types of data that should be maintained. "Certified cost or pricing data" includes all data that conforms to FAR 15.408, Table 15–2, while "data other than certified cost or pricing data" includes only the level of data the contracting officer needs to determine the price fair and reasonable. Whichever is required to be submitted, this section makes it clear that it shall be documented in the contract file.

3. Comment: FAR 13.106–3(a)(2)(iii) contradicts FAR 15.404–1(b)(2)(iv) as FAR 13.106–3(a)(2)(iii) appears to indicate non-acceptability of price lists and catalogs as a price analysis stand alone technique.

Response: Neither of the referenced texts is part of this rulemaking. Nonetheless, we note that the references do not conflict. Both references list various techniques and types of information the contracting officer may use, either individually or collectively. The type and extent of data needed is based on the contracting officer's business judgment. FAR 13.106–3(a)(2)(iii) simply adds a cautionary note when using catalog prices.

4. Comment: Change language in the proposed FAR 15.403–3(a)(1)(ii) from "If the contracting officer cannot obtain adequate data from sources other than the offeror, the contracting officer shall require" to "If the contracting officer determines that adequate data from sources other than the offeror is not available, the contracting officer shall require."

Response: We concur that the contracting officer should determine when adequate data is not available and have clarified the final rule accordingly. However, "data" is plural and requires the verb "are available" rather than "is available".

5. Comment: The new language at FAR 15.404–1(b) confuses the difference between cost analysis and price analysis when it states that "Price analysis may include evaluating data other than certified cost or pricing data obtained from the offeror or contractor when there is no other means for determining a fair and reasonable price." Price analysis should only be applied to sales data obtained from the offeror.

Response: The referenced paragraph is a discussion of "price" analysis. The referenced text simply points out that in performing price analysis, the contracting officer may require data other than certified cost or pricing data. Price analysis is not limited to sales data.

6. Comment: Language at FAR 15.404–1(b)(2)(ii) needs clarification.

Response: Changes have been made to FAR 15.404–1(b)(2)(ii) to clarify the text.

7. Comment: In reference to FAR 15.408, Table 15–2, changing the word "information" to the phrase "data other than certified cost or pricing data" means that the contractor does not have to certify all the cost or pricing data. Changing these terms is changing the requirement under TINA.

Response: The final rule utilizes the term "information" in a few instances, not as a term of art as it had been used in FAR part 15 prior to this revision, but generically. The requirements under TINA have not been changed.

8. Comment: The proposed language that adds "certified cost or pricing data and data other than certified cost or pricing data" at FAR 15.408, Table 15–2, means that the offeror could withhold disclosure or certification of cost or pricing data related to its subcontractors, in cases when the subcontractor is not required to certify.

Response: When "certified cost or pricing data" is required, the prime contractor is responsible for certifying the completeness of all cost or pricing data, which includes subcontractor price quotes and cost data when the subcontractor is not required to certify to its data. The requirement for the prime contractor to certify that it has submitted all of the facts regarding subcontractor cost data or pricing data, even if the subcontractor is not required to submit "certified cost or pricing data," is implicitly in the certification language at FAR 15.406–2(a).

9. Comment: Throughout the proposed rule, including the clauses, change "required certified cost or pricing data and data other than certified cost or pricing data" back to "required certified cost or pricing data, or data other than certified cost or pricing data."

Response: The phrases "certified cost or pricing data" and "data other than certified cost or pricing data" are joined with "and" when they are used to refer to both types of data collectively. The phrases are joined with "or" when the phrases are used to refer to either one or the other type of data. See the response to General Comments number 2.

10. Comment: FAR 52.214–26, Audit and Records—Sealed Bidding, expand the Government's rights by allowing the Government to audit and review the contractor's records when certified cost or pricing data are not required. There is no authority to do this.

Response: This change was in error and the final rule deletes that addition.

11. Comment: The proposed rule inappropriately adds the phrase "data other than certified cost or pricing data" to clauses and FAR 15.408, Table 15–2, when only certified cost or pricing data apply.

Response: The final rule adds clarifying language to indicate that, when certified cost or pricing data is required, data other than certified cost or pricing data may also be required. See the responses to General Comments numbers 2 and 4, and Specific Comments number 9.

12. Comment: Why is Alternate I of FAR 52.215–21(b) marked reserved? It shouldn't be.

Response: The final rule retains Alternate I.

13. Comment: The Councils are inappropriately prescribing the use of FAR 15.408, Table 15–2, for both "certified cost or pricing data" and "data other than certified cost or pricing data". By doing so, the Councils are advocating cost analysis on commercial items.

Response: This comment is similar to the Specific Comments numbers 7 and 9. The language in the table and clauses is revised in the final rule. FAR 15.408, Table 15–2, applies only when certified cost or pricing data are required. However, when certified cost or pricing data are required, data other than certified cost or pricing data may also be required. Additionally, cost analysis can be used when an item that was thought initially to be commercial is found not to have sufficient sales data or other information for determining the price to be fair and reasonable. In each situation, and in accordance with FAR 1.602–2, the contracting officer must exercise business judgment as to the level and type of data needed to determine that prices are fair and reasonable following the order of preference at FAR 15.402(a). See the responses to General Comments numbers 2 and 4, and to Specific Comments numbers 7 and 9.

14. Comment: The rule will not address situations when a contracting officer inappropriately determines an item to be commercial.

Response: Commercial item determinations are beyond the scope of this rule. This rule is to clarify what data are needed to determine whether prices are fair and reasonable as required by FAR part 15. The procedures for making the determination under FAR part 12 are outside the scope of this rule about the definitions of phrases associated with cost or pricing data, and the requirements for their submission.

15. Comment: Cost data should only be used when there are no other means to determine whether price is fair and reasonable.

Response: The order of preference at FAR 15.402(a) has been restructured, but is essentially unchanged. Certified cost or pricing data must be obtained when required by TINA. When certified cost or pricing data are not required, the order of preference at FAR 15.402(a) must generally be followed.

16. Comment: Contracting officers should never have to rely on cost data from the offeror to determine if the price for a commercial item is fair and reasonable.

Response: The contracting officer retains the authority to request cost data where other information, including pricing data, is either unavailable or inadequate to establish that prices offered for a commercial item are fair and reasonable. However, the FAR policy is to only require submission of "data other than certified cost or pricing data," and only to the extent necessary to support the contracting officer's determination of a fair and reasonable price.

17. Comment: The proposed rule demands that the contracting officer obtains additional data (and "all facts") regardless of needs and reverses the presumption of the present FAR, which asserts that the contracting officer should not obtain more information than needed. The proposed rule requires greatly increased amounts of information even where certified cost or pricing data is not required. This is contrary to the language of the statute (TINA).

Response: The language in FAR 15.402(a); FAR 15.408, FAR Table 15–2; and the clauses are revised in the final rule. When certified cost or pricing data are required, data other than certified cost or pricing data may also be required. The contracting officer is cautioned to obtain data other than certified cost or pricing as necessary to establish a fair and reasonable price. See section A, Background; see also the responses to the Specific Comments numbers 7, 9, and 16.

18. Comment: The proposed FAR 15.403–3(c)(1) implies that contractors face vague and unbounded disclosure obligations (*i.e.,* "cost data, or any other information the contracting officer requires" and "at a minimum, appropriate data on * * * prices") that likely will be highly varied in application to different procurements. This costly burden is unnecessary—certainly where it applies to exempt procurements, *e.g.,* commercial items. Proposed changes conflict with TINA.

Response: TINA and the existing FAR permit a contracting officer to obtain all data that is needed, in the contracting officer's discretion (which may vary among contracting officers), to determine the price to be fair and reasonable. See the order of preference at FAR 15.402(a), Pricing Policy. The present rule does not change that. The intent is to leave latitude for contracting officers to exercise business judgment (FAR 1.602–2) in obtaining whatever data are required in order to be able to determine a price fair and reasonable, following the order of preference at FAR 15.402(a). No negotiated procurements, including procurements of commercial items, are "exempt" from a contracting officer requiring submission of data other than certified cost or pricing data when it is needed to determine a fair and reasonable price. The proposed rule is consistent with the existing FAR, the requirements of TINA, the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103–355), and the Clinger Cohen Act of 1996 (Pub. L. 104–106). It does not add any requirements that do not already exist in the statutes and FAR. See the response to Specific Comments number 16.

19. Comment: The proposed rule adds the requirement that price be "fair" and "reasonable" in circumstances where the previous FAR required only demonstration of price "reasonableness."

Response: Under the existing FAR, the contracting officer must determine prices to be fair and reasonable (see FAR 15.402(a)). The final rule makes no changes to this basic policy.

20. Comment: The proposed rule also obligates the contracting officer to require submission of "data other than certified cost or pricing data." This is a profound change because the contractor must submit both certified cost or pricing data and something else.

Response: See section A, Background. Also, see responses to Specific Comments numbers 7, 9, and 11.

21. Comment: The proposed rule at FAR 15.404–1(b)(1) adds a new term, "price or cost data." What is "price or cost data?"

Response: The language has been removed. The final rule clarifies the language at FAR 15.404–1(b) to correct "price or cost data" to "data other than certified cost or pricing data".

22. Comment: What is "commercial item analysis" at FAR 15.404–1(b)?

Response: The phrase has been deleted.

23. Comment: The proposed rule at FAR 15.404–1(b)(2)(ii) creates extensive additional disclosure requirements, which affect the eligibility for the "commercial item" exemption. These include very particular demands concerning "prior price," "terms and conditions," "market and economic factors," "differences between the similar item and the item being procured" and encouragement to use expert technical advice to evaluate "minor modifications." The effect of these requirements is to reduce the availability and utility of the "commercial item" exception and to create, again, a whole class of "surrogate" data that is uncertified but nevertheless burdensome and expensive to produce.

Response: The contracting officer must be able to determine that the price is fair and reasonable. The fair and reasonable price can be the commercial

price. To the extent there are sufficient commercial sales of the item being procured for the same or similar quantities, both the validity of the comparison and the reasonableness of the previous prices can be established, and the company shares that commercial sales data with the contracting officer when it cannot be obtained by the Government through normal market research, so that the contracting officer can determine a fair and reasonable price, obtaining further "data other than certified cost or pricing data" will not be necessary. See section A, Background, and the responses to Specific Comments numbers 7, 9, and 11.

24. Comment: The rule will create confusion when commercial items are being procured by putting contracting officers in a position where the only safe alternative will be to demand the maximum amount of data from an offeror.

Response: There is no fundamental change from the existing requirements that contracting officers: "shall not obtain more data or information than necessary." To the extent there are sufficient commercial sales of the item for the same or similar quantities, both the validity of the comparison and the reasonableness of the previous price can be established, and the company shares that information with the contracting officer when it cannot be obtained by the Government through normal market research, so that the contracting officer can determine a fair and reasonable price, additional data requests will not be required. This is not a departure from the existing FAR requirement. See section A, Background.

25. Comment: We believe the FAR Council is expressing dissatisfaction with the ability of the acquisition workforce to do price analysis rather than the more familiar cost analysis and recommend providing adequate training rather than making significant changes to established regulations.

Response: See section A, Background, and the Background section of the proposed rule **Federal Register** notice (72 FR 20092, April 23, 2007), concerning the confusion over the current FAR language, and further expressed in these public comments about existing FAR requirements. Training of our acquisition workforce in all types of proposal analysis is an ongoing effort. The workforce needs the cooperation of contractors to submit required data so that contracting officers can ensure a fair and reasonable price. We believe this final rule helps clarify requirements for submitting data consistent with the existing FAR. The Councils anticipate the development of training to help the workforce understand and apply the rule.

26. Comment: Recommend Councils conduct a public meeting.

Response: A public meeting was held on November 15, 2007, to ensure that all interested parties had an opportunity to provide additional input. The public meeting was followed by the opportunity for interested parties to submit comments.

27. Comment: Existing regulations delineate that data provided in support of proposals fall into two distinct categories: "cost or pricing data" and "information other than cost or pricing data." The primary differentiator between cost or pricing data and information other than cost or pricing data is that the former requires certification in accordance with FAR 15.406–2, while the latter is any type of information that does not require certification per FAR 15.406–2. The existing regulations clearly state that "information other than cost or pricing data" is "any type of information that is not required to be certified" and that the definition "includes cost or pricing data for which certification is determined inapplicable after submission." As a result, there is no ambiguity as to the type of data that can be requested or obtained through the submission of "information other than cost or pricing data." The Councils have changed the type of non-certifiable data to include "cost data" rather than what was previously referred to as "cost information." The FAR Council's intent to clarify that the two terms result in underlying data that is the same, appears to be in direct conflict with the statutory definition. That statute does not eliminate the possibility that the data may be the same but it provides a different standard for "other information." Accordingly, there are two different types of data defined in TINA, "cost or pricing data" that is required to be certified and "other information" that is not required to be certified.

Response: We believe this comment demonstrates the confusion reported to the Councils. TINA and FAR 15.402(a) require that the contracting officer shall require submission of data other than certified cost or pricing data to the extent necessary to determine the reasonableness of the price. We agree with the respondent's comment that the definition of "information other than cost or pricing data", in effect prior to this final rule, included cost or pricing data for which certification is determined inapplicable after submission. The contracting officer must obtain whatever level of data is needed to determine price reasonableness, but cannot require certification of cost or pricing data (should cost or pricing data be needed) if the certification requirement of TINA does not apply. However, some contractors incorrectly believed that the FAR definition of "information other than cost or pricing data" in effect prior to this final rule, precluded the contracting officer from obtaining uncertified cost or pricing data.

Section 2306a(h) of Title 10, as well as section 254b(h) of Title 41 of the U.S. Code, define both "cost or pricing data" and the circumstances under which that data must be certified. When the data must be certified, that data becomes "certified cost or pricing data." If, after submittal, no certification is required, the data becomes "data other than certified cost or pricing data." Sections 2306a(d)(1) and 254b(d)(1) state: "When certified cost or pricing data are not required * * * the contracting officer shall require submission of data other than certified cost or pricing data to the extent necessary to determine the reasonableness of the price * * * the contracting officer shall require that the data submitted include, at a minimum, appropriate information on prices at which the same or similar items have previously been sold. * * *" The statutory requirement is to obtain data necessary to determine the reasonableness of the price. The contracting officer cannot require certification of the data submitted if TINA does not require it to be certified. If the contracting officer has no other means to determine the reasonableness of the price (the main requirement of TINA), then the contracting officer shall require the submission of the necessary data needed to make that determination, including, at a minimum, prices at which the same or similar items have been previously sold. TINA does not prohibit obtaining cost or pricing data when "certified cost or pricing data" is not required to be obtained, but TINA (10 U.S.C. 2306(d)), as well as the FAR, provide requirements to ensure the contracting officer does not require more data than is necessary to determine that the prices are fair and reasonable.

28. Comment: The proposed rule would lead contracting officers to expect offerors to maintain traditional Government cost accounting data for commercial items.

Response: There is no requirement for anything more than the type of commercial data customarily maintained. See FAR 15.403–3(a)(2), FAR 15.403–3(c)(2), and FAR 15.403–5(b)(2).

29. Comment: Use of the word "claimed" at FAR 15.403–1(c)(3)(i) reveals a great deal about the underlying philosophy that is perpetuated throughout the proposed rule.

Response: The word "claimed" in FAR 15.403–1(c)(3)(i) is not new; it is part of the existing language. There is no inference of intent on the use of the word. The intent of the rule is to make it clear that contracting officers must obtain the level of data needed in order to meet the requirements of TINA (10 U.S.C. 2306a(d)(1) and 41 U.S.C. 254b(d)(1)), which states that "* * * the contracting officer shall require submission of data * * * necessary to determine the reasonableness of the price * * *."

30. Comment: FAR subpart 15.4 should not be used to determine whether or not an item being offered is a commercial item.

Response: FAR subpart 15.4 is not used to determine whether or not an item is a commercial item. However, it is appropriate in FAR subpart 15.4 to require contracting officers to affirmatively decide if an item being offered meets the definition of "commercial item" before asking a contractor to provide cost or pricing data, if cost analysis is the contracting officer's only means to determine the price to be fair and reasonable.

31. Comment: The proposed change to FAR 15.403–3(c), Commercial Items, states that even if an offeror provides catalog or market pricing, the contracting officer cannot assume that such information would be sufficient to establish a fair and reasonable price, and therefore, the contracting officer "shall require" the offeror to submit data other than certified cost or pricing data to support further analysis.

Response: There was no substantive change in the language in question; it is essentially the existing language. The language gives no mention to "market pricing." Considering FAR subpart 15.4 in its entirety, if there is adequate market pricing, the contracting officer is prohibited from requiring data from the contractor (FAR 15.402(a) and FAR 15.403–3(a)). The current language and revised language in this final rule only requires submission of data other than certified cost or pricing data in accordance with the order of preference at FAR 15.402(a), and then only to the level of detail needed to support a determination of a fair and reasonable price.

32. Comment: The proposed change to FAR 52.215–20, illustrates the tremendous confusion the proposed rule will cause and the onerous nature of the pricing requirements for commercial items. The proposed rule would "require" contracting officers to demand that offerors proposing commercial items submit "data other than certified cost or pricing data" if the contracting officer believes it is necessary to determine prices fair and reasonable. Proposed paragraph (b) of FAR 52.215–20 then states that if the offeror is not granted an exception from TINA, then the offeror shall submit "data other than certified cost or pricing data."

Response: FAR 52.215–20 clause requires offerors to submit "data other than certified cost or pricing data" if the contracting officer believes it is necessary to determine prices to be fair and reasonable. The final rule clarifies in paragraph (b) of the contract clause FAR 52.215–20 that the data required under Table 15–2 includes "data other than certified cost or pricing data" as well as "certified cost or pricing data".

33. Comment: Within the proposed rule, the Councils have made significant changes that result in the reprioritizing of the Government's pricing policy as detailed at FAR 15.402.

Response: In response to comments, the final rule reorganizes the FAR 15.402(a) to clarify the policy, but the policy remains essentially unchanged. See section A, Background.

34. Comment: The proposed rule revisions at FAR 15.402(a) suggests that the "data other than certified cost or pricing data" is preferred over "certified cost or pricing data", even when certification is required by FAR 15.403–4.

Response: In response to comments, the final rule reorganizes FAR 15.402(a) to emphasize that certified cost or pricing data shall be obtained when required by TINA. When certified cost or pricing data are not required, the order of preference at FAR 15.402(a)(2) should generally be followed.

35. Comment: The DoD-specific issues cited in the proposed rule and at the public meeting have been adequately addressed by the Director of Defense Procurement and Acquisition Policy through recent policy memos, policy guidance, and contract pricing training. These actions should be given a chance to work before further regulatory changes are made that would impede the U.S. Government's access to the commercial marketplace.

Response: The purpose of the FAR rulemaking is to eliminate confusion throughout the Government and to clarify for all agencies and their contractors definitions and associated responsibilities for the request and submission of certified cost or pricing data and data other than certified cost or pricing data. While DoD guidance is helpful to the DoD acquisition workforce, years of experiences throughout Government show that the current FAR language is causing confusion over what a contractor is required to submit to support prices. This confusion leads to inefficient procurement processes and sometimes leads to the Government paying unreasonable prices. The revised language clarifies the regulation, and is consistent with TINA, by requiring the contracting officer to obtain only the data necessary to determine the fairness and reasonableness of the price.

36. Comment: The current FAR rules, when properly exercised, are already capable of achieving fair and reasonable prices and, in this respondent's opinion, the definitions are clear and unambiguous, and contracting officers have significant latitude under current regulations to acquire data from contractors to support price reasonableness of commercial items.

Response: See section A, Background, and also the responses to Specific Comments numbers 7, 9, 11, and 23.

37. Comment: There are no proposed changes to make contracting officers aware that cost data from commercial companies will most likely not be in a form that complies with their expectations, training, or experience. Cost data from commercial companies will not comply with Cost Accounting Standards, FAR part 31, and are not generally suitable for certification under the Truth in Negotiations Act. The FAR council should not use terminology that is part of a cost-based contracting process.

Response: Current regulations and TINA already require contractors to provide certified cost or pricing data, and data other than certified cost or pricing data as necessary, that will enable the contracting officer to determine fair and reasonable prices. The rule clarifies the regulations by using language consistent with TINA more precisely. The rule does not expand the contracting officer's authority to request data from commercial companies when needed for the determination that prices are fair and reasonable. The challenge the comment reflects may be real, but it is not affected by the rule.

38. Comment: The proposed rule would revise the order of preference of data at FAR 15.402(a) and would eliminate the distinction between "cost or pricing data" and "information other than cost or pricing data."

Response: The order of preference is not changed. By eliminating the ambiguous phrase "information other than cost or pricing data," the rule

clarifies and maintains the distinction between "certified cost or pricing data" and "data other than certified cost or pricing data," tracking the statutory distinctions. As stated in other responses herein, the revised definitions clearly describe what is required by TINA and intended by this rule. TINA defines "cost or pricing data," and then prescribes when such data shall be certified. The nature and extent of "cost or pricing data" is the same regardless of whether it is certified or not. The statute also prescribes when a contractor must provide "data other than certified cost or pricing data" (which includes "cost or pricing data" and judgmental information) without being required to certify it. Under the current law and regulations, a contracting officer is empowered to obtain all the data and judgmental information needed to determine a fair and reasonable price, but is restricted as to which data, and when that data, must be certified.

39. Comment: By eliminating the term "information" and substituting the term "data" the rule would add ambiguity as to the legal status of the submission by commercial companies that cannot provide FAR compliant cost data.

Response: The use of the term "data" is consistent with the statute and with the Government's need to obtain factual information to be used as a basis for reasoning, discussion, or calculation. The rule does not change the existing strong limitations in the FAR on the circumstances under which a contracting officer can obtain certified cost or pricing data from commercial sources. It does not change the current restrictions on the amount of data a contracting officer can obtain (*i.e.,* only that data to the extent necessary to determine fair and reasonable prices.) The rule also retains the existing flexibility to use contractor data formats.

40. Comment: The "of a type" language in the proposed rule at FAR 15.404–1(b)(2)(i) and FAR 15.401(b)(ii)(C) introduces ambiguity as to the meaning of a commercial item. It is recommended that the "of a type" language be deleted from the proposed rule as it seems to add no clarity to the definition of a commercial item or how commercial items are to be priced.

Response: We believe the respondent meant FAR 15.404–1(b)(2)(ii) and FAR 15.404–1(b)(2)(ii)(C). The references in the comment either do not have the "of a type" text, or the reference is erroneous. These subparagraphs of the FAR provide requirements for price analysis and appropriately directs contracting officers to consider price comparisons even in situations when the proposed item is "of a type" that is customarily used by the general public or non-governmental entities for purposes other than governmental purposes, a term used consistently in the definition of commercial item at FAR 2.101. This section also appropriately directs contracting officers to obtain technical assistance.

41. Comment: The proposed rule fails to address the confusion in pricing noncompetitive (sole-source) commercial items and guides the contracting officer to perform price analysis of previous DoD (Government) prices to determine price reasonableness.

Response: The intent of the rule is for contracting officers to follow the order of preference, which includes price analysis (including price analysis of previous Government and non-Government sales). The Councils recognize, however, that there has been confusion over the type and amount of data that can be required by a contracting officer, particularly in non-competitive (sole-source) acquisitions of commercial items. Accordingly, for the sake of clarification, changes were made at FAR 15.402(a)(2)(ii)(A), FAR 15.403–1(c)(3)(i), and FAR 15.403–3(c) to emphasize the need for the contracting officer to review the history of sales to non-governmental and governmental entities, determine whether an item is a commercial item, and decide whether certified cost or pricing data are required. The changes to FAR 15.402(a) provide sufficient flexibility to the contracting officer to address the specific contracting situation. As revised, this rule clarifies that TINA authorizes a contracting officer to obtain data other than certified cost or pricing data to the extent necessary to establish a fair and reasonable price, even when the acquisition is for a commercial item. Therefore, the rule sets forth appropriate guidance for determining fair and reasonable prices.

This is a significant regulatory action and, therefore, was subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

C. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* because the rule does not expand or diminish the existing rights of the contracting officer to obtain cost data or pricing data. Further, most acquisitions involving small entities are under the threshold for the submission of certified cost or pricing data of $700,000, the new TINA threshold (see FAR Case 2008–024, Item I of this FAC). Finally, this rule will benefit all entities, both large and small, by clarifying the requirements for the submission of "certified cost or pricing data" and "data other than certified cost or pricing data."

D. Paperwork Reduction Act

The Paperwork Reduction Act does apply; however, these changes to the FAR do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 9000–0013.

List of Subjects in 48 CFR Parts 2, 4, 12, 14, 15, 16, 19, 27, 30, 31, 32, 42, 44, 49, and 52

Government procurement.

Dated: August 18, 2010.

Edward Loeb,

Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 4, 12, 14, 15, 16, 19, 27, 30, 31, 32, 42, 44, 49, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 4, 12, 14, 15, 16, 19, 27, 30, 31, 32, 42, 44, 49, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 2—DEFINITIONS OF WORDS AND TERMS

■ 2. Amend section 2.101 in paragraph (b)(2) by—

■ a. Adding, in alphabetical order, the definition "Certified cost or pricing data";

■ b. Revising the introductory text of the definition "Cost or pricing data";

■ c. Adding, in alphabetical order, the definition "Data other than certified cost or pricing data"; and

■ d. Removing the definition "Information other than cost or pricing data".

The added and revised text reads as follows:

2.101 Definitions

* * * * *

(b) * * *

(2) * * *

Certified cost or pricing data means "cost or pricing data" that were required to be submitted in accordance with FAR 15.403–4 and 15.403–5 and have been certified, or are required to be certified,

in accordance with 15.406–2. This certification states that, to the best of the person's knowledge and belief, the cost or pricing data are accurate, complete, and current as of a date certain before contract award. Cost or pricing data are required to be certified in certain procurements (10 U.S.C. 2306a and 41 U.S.C. 254b).

* * * * *

Cost or pricing data (10 U.S.C. 2306a(h)(1) and 41 U.S.C. 254b) means all facts that, as of the date of price agreement, or, if applicable, an earlier date agreed upon between the parties that is as close as practicable to the date of agreement on price, prudent buyers and sellers would reasonably expect to affect price negotiations significantly. Cost or pricing data are factual, not judgmental; and are verifiable. While they do not indicate the accuracy of the prospective contractor's judgment about estimated future costs or projections, they do include the data forming the basis for that judgment. Cost or pricing data are more than historical accounting data; they are all the facts that can be reasonably expected to contribute to the soundness of estimates of future costs and to the validity of determinations of costs already incurred. They also include, but are not limited to, such factors as—

* * * * *

Data other than certified cost or pricing data means pricing data, cost data, and judgmental information necessary for the contracting officer to determine a fair and reasonable price or to determine cost realism. Such data may include the identical types of data as certified cost or pricing data, consistent with Table 15–2 of 15.408, but without the certification. The data may also include, for example, sales data and any information reasonably required to explain the offeror's estimating process, including, but not limited to—

(1) The judgmental factors applied and the mathematical or other methods used in the estimate, including those used in projecting from known data; and

(2) The nature and amount of any contingencies included in the proposed price.

* * * * *

PART 4—ADMINISTRATIVE MATTERS

4.704 [Amended]

■ 3. Amend section 4.704 in paragraph (b) by removing "for cost" and adding "for certified cost" in its place.

■ 4. Amend section 4.803 by revising paragraphs (a)(17) and (b)(4) to read as follows:

4.803 Contents of contract files.

* * * * *

(a) * * *

(17) Data and information related to the contracting officer's determination of a fair and reasonable price. This may include—

(i) Certified cost or pricing data;

(ii) Data other than certified cost or pricing data;

(iii) Justification for waiver from the requirement to submit certified cost or pricing data; or

(iv) Certificates of Current Cost or Pricing Data.

* * * * *

(b) * * *

(4) Certified cost or pricing data, Certificates of Current Cost or Pricing Data, or data other than certified cost or pricing data; cost or price analysis; and other documentation supporting contractual actions executed by the contract administration office.

* * * * *

PART 12—ACQUISITON OF COMMERCIAL ITEMS

12.102 [Amended]

■ 5. Amend section 12.102 in paragraph (f)(2)(ii) by removing "Cost or pricing" and adding "Certified cost or pricing" in its place.

12.504 [Amended]

■ 6. Amend section 12.504 in paragraph (a)(7) by removing "provide cost" and adding "provide certified cost" in its place.

PART 14—SEALED BIDDING

■ 7. Amend section 14.201–7 by removing from paragraph (a)(1)(ii) "of cost" and adding "of certified cost" in its place; and by revising paragraphs (b)(1) and (c)(1) to read as follows:

14.201–7 Contract clauses.

* * * * *

(b)(1) When contracting by sealed bidding, the contracting officer shall insert the clause at 52.214–27, Price Reduction for Defective Certified Cost or Pricing Data—Modifications—Sealed Bidding, in solicitations and contracts if the contract amount is expected to exceed the threshold for submission of certified cost or pricing data at 15.403–4(a)(1).

* * * * *

(c)(1) When contracting by sealed bidding, the contracting officer shall insert the clause at 52.214–28, Subcontractor Certified Cost or Pricing Data—Modifications—Sealed Bidding, in solicitations and contracts if the contract amount is expected to exceed the threshold for submission of certified cost or pricing data at 15.403–4(a)(1).

* * * * *

PART 15—CONTRACTING BY NEGOTIATION

■ 8. Amend section 15.204–5 by revising paragraph (b)(5) to read as follows:

15.204–5 Part IV—Representations and Instructions.

* * * * *

(b) * * *

(5) Certified cost or pricing data (see Table 15–2 of 15.408) or data other than certified cost or pricing data.

* * * * *

■ 9. Amend section 15.402 by revising the introductory text and paragraph (a) to read as follows:

15.402 Pricing policy.

Contracting officers shall—

(a) Purchase supplies and services from responsible sources at fair and reasonable prices. In establishing the reasonableness of the offered prices, the contracting officer—

(1) Shall obtain certified cost or pricing data when required by 15.403–4, along with data other than certified cost or pricing data as necessary to establish a fair and reasonable price; or

(2) When certified cost or pricing data are not required by 15.403–4, obtain data other than certified cost or pricing data as necessary to establish a fair and reasonable price, generally using the following order of preference in determining the type of data required:

(i) No additional data from the offeror, if the price is based on adequate price competition, except as provided by 15.403–3(b).

(ii) Data other than certified cost or pricing data such as—

(A) Data related to prices (*e.g.,* established catalog or market prices, sales to non-governmental and governmental entities), relying first on data available within the Government; second, on data obtained from sources other than the offeror; and, if necessary, on data obtained from the offeror. When obtaining data from the offeror is necessary, unless an exception under 15.403–1(b)(1) or (2) applies, such data submitted by the offeror shall include, at a minimum, appropriate data on the prices at which the same or similar items have been sold previously, adequate for evaluating the reasonableness of the price.

(B) Cost data to the extent necessary for the contracting officer to determine a fair and reasonable price.

(3) Obtain the type and quantity of data necessary to establish a fair and

reasonable price, but not more data than is necessary. Requesting unnecessary data can lead to increased proposal preparation costs, generally extend acquisition lead time, and consume additional contractor and Government resources. Use techniques such as, but not limited to, price analysis, cost analysis, and/or cost realism analysis to establish a fair and reasonable price. If a fair and reasonable price cannot be established by the contracting officer from the analyses of the data obtained or submitted to date, the contracting officer shall require the submission of additional data sufficient for the contracting officer to support the determination of the fair and reasonable price.

* * * * *

■ 10. Amend section 15.403 by revising the section heading to read as follows:

15.403 Obtaining certified cost or pricing data.

* * * * *

■ 11. Amend section 15.403–1 by—

■ a. Revising the section heading, paragraph (a), the introductory text of paragraph (b), the heading to paragraph (c) introductory text, and paragraph (c)(3)(i);

■ b. Removing from paragraph (c)(3)(iii)(A) "of cost" and adding "of certified cost" in its place;

■ c. Revising paragraphs (c)(3)(iii)(B) and (c)(3)(iii)(C);

■ d. Removing from paragraph (c)(3)(iv) "for cost" and adding "for certified cost" in its place; and

■ e. Revising the introductory text of paragraph (c)(4).

The revised text reads as follows:

15.403–1 Prohibition on obtaining certified cost or pricing data (10 U.S.C. 2306a and 41 U.S.C. 254b).

(a) Certified cost or pricing data shall not be obtained for acquisitions at or below the simplified acquisition threshold.

(b) *Exceptions to certified cost or pricing data requirements.* The contracting officer shall not require certified cost or pricing data to support any action (contracts, subcontracts, or modifications) (but may require data other than certified cost or pricing data as defined in FAR 2.101 to support a determination of a fair and reasonable price or cost realism)—

* * * * *

(c) *Standards for exceptions from certified cost or pricing data requirements*—* * *

(3) * * *

(i) Any acquisition of an item that the contracting officer determines meets the commercial item definition in 2.101, or any modification, as defined in paragraph (3)(i) of that definition, that does not change the item from a commercial item to a noncommercial item, is exempt from the requirement for certified cost or pricing data. If the contracting officer determines that an item claimed to be commercial is, in fact, not commercial and that no other exception or waiver applies, (*e.g.* the acquisition is not based on adequate price competition; the acquisition is not based on prices set by law or regulation; and the acquisition exceeds the threshold for the submission of certified cost or pricing data at 15.403–4(a)(1)) the contracting officer shall require submission of certified cost or pricing data.

* * * * *

(iii) * * *

(B) For acquisitions funded by DoD, NASA, or Coast Guard, such modifications of a commercial item are exempt from the requirement for submission of certified cost or pricing data provided the total price of all such modifications under a particular contract action does not exceed the greater of the threshold for obtaining certified cost or pricing data in 15.403–4 or 5 percent of the total price of the contract at the time of contract award.

(C) For acquisitions funded by DoD, NASA, or Coast Guard such modifications of a commercial item are not exempt from the requirement for submission of certified cost or pricing data on the basis of the exemption provided for at 15.403–1(c)(3) if the total price of all such modifications under a particular contract action exceeds the greater of the threshold for obtaining certified cost or pricing data in 15.403–4 or 5 percent of the total price of the contract at the time of contract award.

* * * * *

(4) *Waivers.* The head of the contracting activity (HCA) may, without power of delegation, waive the requirement for submission of certified cost or pricing data in exceptional cases. The authorization for the waiver and the supporting rationale shall be in writing. The HCA may consider waiving the requirement if the price can be determined to be fair and reasonable without submission of certified cost or pricing data. For example, if certified cost or pricing data were furnished on previous production buys and the contracting officer determines such data are sufficient, when combined with updated data, a waiver may be granted. If the HCA has waived the requirement for submission of certified cost or pricing data, the contractor or higher-tier subcontractor to whom the waiver relates shall be considered as having been required to provide certified cost or pricing data. Consequently, award of any lower-tier subcontract expected to exceed the certified cost or pricing data threshold requires the submission of certified cost or pricing data unless—

* * * * *

■ 12. Revise section 15.403–2 to read as follows:

15.403–2 Other circumstances where certified cost or pricing data are not required.

(a) The exercise of an option at the price established at contract award or initial negotiation does not require submission of certified cost or pricing data.

(b) Certified cost or pricing data are not required for proposals used solely for overrun funding or interim billing price adjustments.

■ 13. Revise section 15.403–3 to read as follows:

15.403–3 Requiring data other than certified cost or pricing data.

(a)(1) In those acquisitions that do not require certified cost or pricing data, the contracting officer shall—

(i) Obtain whatever data are available from Government or other secondary sources and use that data in determining a fair and reasonable price;

(ii) Require submission of data other than certified cost or pricing data, as defined in 2.101, from the offeror to the extent necessary to determine a fair and reasonable price (10 U.S.C. 2306a(d)(1) and 41 U.S.C. 254b(d)(1)) if the contracting officer determines that adequate data from sources other than the offeror are not available. This includes requiring data from an offeror to support a cost realism analysis;

(iii) Consider whether cost data are necessary to determine a fair and reasonable price when there is not adequate price competition;

(iv) Require that the data submitted by the offeror include, at a minimum, appropriate data on the prices at which the same item or similar items have previously been sold, adequate for determining the reasonableness of the price unless an exception under 15.403–1(b)(1) or (2) applies; and

(v) Consider the guidance in section 3.3, chapter 3, volume I, of the Contract Pricing Reference Guide cited at 15.404–1(a)(7) to determine the data an offeror shall be required to submit.

(2) The contractor's format for submitting the data should be used (see 15.403–5(b)(2)).

(3) The contracting officer shall ensure that data used to support price negotiations are sufficiently current to

permit negotiation of a fair and reasonable price. Requests for updated offeror data should be limited to data that affect the adequacy of the proposal for negotiations, such as changes in price lists.

(4) As specified in section 808 of the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999 (Pub. L. 105–261), an offeror who does not comply with a requirement to submit data for a contract or subcontract in accordance with paragraph (a)(1) of this subsection is ineligible for award unless the HCA determines that it is in the best interest of the Government to make the award to that offeror, based on consideration of the following:

(i) The effort made to obtain the data.

(ii) The need for the item or service.

(iii) Increased cost or significant harm to the Government if award is not made.

(b) *Adequate price competition.* When adequate price competition exists (see 15.403–1(c)(1)), generally no additional data are necessary to determine the reasonableness of price. However, if there are unusual circumstances where it is concluded that additional data are necessary to determine the reasonableness of price, the contracting officer shall, to the maximum extent practicable, obtain the additional data from sources other than the offeror. In addition, the contracting officer should request data to determine the cost realism of competing offers or to evaluate competing approaches.

(c) *Commercial items.* (1) At a minimum, the contracting officer must use price analysis to determine whether the price is fair and reasonable whenever the contracting officer acquires a commercial item (see 15.404–1(b)). The fact that a price is included in a catalog does not, in and of itself, make it fair and reasonable. If the contracting officer cannot determine whether an offered price is fair and reasonable, even after obtaining additional data from sources other than the offeror, then the contracting officer shall require the offeror to submit data other than certified cost or pricing data to support further analysis (see 15.404–1). This data may include history of sales to non-governmental and governmental entities, cost data, or any other information the contracting officer requires to determine the price is fair and reasonable. Unless an exception under 15.403–1(b)(1) or (2) applies, the contracting officer shall require that the data submitted by the offeror include, at a minimum, appropriate data on the prices at which the same item or similar items have previously been sold, adequate for determining the reasonableness of the price.

(2) *Limitations relating to commercial items (10 U.S.C. 2306a(d)(2) and 41 U.S.C. 254b(d)(2)).* (i) The contracting officer shall limit requests for sales data relating to commercial items to data for the same or similar items during a relevant time period.

(ii) The contracting officer shall, to the maximum extent practicable, limit the scope of the request for data relating to commercial items to include only data that are in the form regularly maintained by the offeror as part of its commercial operations.

(iii) The Government shall not disclose outside the Government data obtained relating to commercial items that is exempt from disclosure under 24.202(a) or the Freedom of Information Act (5 U.S.C. 552(b)).

(3) For services that are not offered and sold competitively in substantial quantities in the commercial marketplace, but are of a type offered and sold competitively in substantial quantities in the commercial marketplace, see 15.403–1(c)(3)(ii).

14. Amend section 15.403–4 by revising the section heading, and paragraphs (a), (b), and (c) to read as follows:

15.403–4 Requiring certified cost or pricing data (10 U.S.C. 2306a and 41 U.S.C. 254b).

(a)(1) The contracting officer shall obtain certified cost or pricing data only if the contracting officer concludes that none of the exceptions in 15.403–1(b) applies. However, if the contracting officer has reason to believe exceptional circumstances exist and has sufficient data available to determine a fair and reasonable price, then the contracting officer should consider requesting a waiver under the exception at 15.403–1(b)(4). The threshold for obtaining certified cost or pricing data is $700,000. Unless an exception applies, certified cost or pricing data are required before accomplishing any of the following actions expected to exceed the current threshold or, in the case of existing contracts, the threshold specified in the contract:

(i) The award of any negotiated contract (except for undefinitized actions such as letter contracts).

(ii) The award of a subcontract at any tier, if the contractor and each higher-tier subcontractor were required to furnish certified cost or pricing data (but see waivers at 15.403–1(c)(4)).

(iii) The modification of any sealed bid or negotiated contract (whether or not certified cost or pricing data were initially required) or any subcontract covered by paragraph (a)(1)(ii) of this subsection. Price adjustment amounts must consider both increases and decreases (*e.g.,* a $200,000 modification resulting from a reduction of $500,000 and an increase of $300,000 is a pricing adjustment exceeding $700,000). This requirement does not apply when unrelated and separately priced changes for which certified cost or pricing data would not otherwise be required are included for administrative convenience in the same modification. Negotiated final pricing actions (such as termination settlements and total final price agreements for fixed-price incentive and redeterminable contracts) are contract modifications requiring certified cost or pricing data if—

(A) The total final price agreement for such settlements or agreements exceeds the pertinent threshold set forth at paragraph (a)(1) of this subsection; or

(B) The partial termination settlement plus the estimate to complete the continued portion of the contract exceeds the pertinent threshold set forth at paragraph (a)(1) of this subsection (see 49.105(c)(15)).

(2) Unless prohibited because an exception at 15.403–1(b) applies, the head of the contracting activity, without power of delegation, may authorize the contracting officer to obtain certified cost or pricing data for pricing actions below the pertinent threshold in paragraph (a)(1) of this subsection, provided the action exceeds the simplified acquisition threshold. The head of the contracting activity shall justify the requirement for certified cost or pricing data. The documentation shall include a written finding that certified cost or pricing data are necessary to determine whether the price is fair and reasonable and the facts supporting that finding.

(b) When certified cost or pricing data are required, the contracting officer shall require the contractor or prospective contractor to submit to the contracting officer (and to have any subcontractor or prospective subcontractor submit to the prime contractor or appropriate subcontractor tier) the following in support of any proposal:

(1) The certified cost or pricing data and data other than certified cost or pricing data required by the contracting officer to determine that the price is fair and reasonable.

(2) A Certificate of Current Cost or Pricing Data, in the format specified in 15.406–2, certifying that to the best of its knowledge and belief, the cost or pricing data were accurate, complete, and current as of the date of agreement on price or, if applicable, an earlier date agreed upon between the parties that is

as close as practicable to the date of agreement on price.

(c) If certified cost or pricing data are requested and submitted by an offeror, but an exception is later found to apply, the data must not be considered certified cost or pricing data as defined in 2.101 and must not be certified in accordance with 15.406–2.

* * * * *

■ 15. Revise section 15.403–5 to read as follows:

15.403–5 Instructions for submission of certified cost or pricing data and data other than certified cost or pricing data.

(a) Taking into consideration the policy at 15.402, the contracting officer shall specify in the solicitation (see 15.408 (l) and (m))—

(1) Whether certified cost or pricing data are required;

(2) That, in lieu of submitting certified cost or pricing data, the offeror may submit a request for exception from the requirement to submit certified cost or pricing data;

(3) Any requirement for data other than certified cost or pricing data; and

(4) The requirement for necessary preaward or postaward access to offeror's records.

(b)(1) *Format for submission of certified cost or pricing data.* When certification is required, the contracting officer may require submission of certified cost or pricing data in the format indicated in Table 15–2 of 15.408, specify an alternative format, or permit submission in the contractor's format (See 15.408(l)(1)), unless the data are required to be submitted on one of the termination forms specified in subpart 49.6.

(2) *Format for submission of data other than certified cost or pricing data.* When required by the contracting officer, data other than certified cost or pricing data may be submitted in the offeror's own format unless the contracting officer decides that use of a specific format is essential for evaluating and determining that the price is fair and reasonable and the format has been described in the solicitation.

(3) *Format for submission of data supporting forward pricing rate agreements.* Data supporting forward pricing rate agreements or final indirect cost proposals shall be submitted in a form acceptable to the contracting officer.

■ 16. Amend section 15.404–1 by—

■ a. Removing from paragraphs (a)(2) and (a)(3) "when cost" and adding "when certified cost" in its place;

■ b. Revising paragraph (a)(4) and the second sentence of paragraph (a)(6);

■ c. Revising the heading of paragraph (b);

■ d. Adding three sentences to the end of paragraph (b)(1);

■ e. Revising the second sentence of paragraph (b)(2)(i), and paragraphs (b)(2)(ii) and (b)(2)(vii);

■ f. Revising paragraph (c)(1);

■ g. Removing from the introductory text of paragraph (c)(2)(i) "cost or" and adding "cost data or" in its place;

■ h. Revising paragraph (c)(2)(v);

■ i. Removing from paragraph (d)(3) "contractors" and adding "contractors' " in its place;

■ j. Removing from paragraph (e)(1) "may" and adding "should" in its place, and removing "equipment, real" and adding "equipment or real" in its place;

■ k. Adding paragraph (e)(3); and

■ l. Removing from the third sentence of paragraph (f)(2) "may" and adding "should" in its place.

The revised and added text reads as follows:

15.404–1 Proposal analysis techniques.

(a) * * *

(4) Cost analysis may also be used to evaluate data other than certified cost or pricing data to determine cost reasonableness or cost realism when a fair and reasonable price cannot be determined through price analysis alone for commercial or non-commercial items.

* * * * *

(6) * * * Any discrepancy or mistake of fact (such as duplications, omissions, and errors in computation) contained in the certified cost or pricing data or data other than certified cost or pricing data submitted in support of a proposal shall be brought to the contracting officer's attention for appropriate action.

* * * * *

(b) *Price analysis for commercial and non-commercial items.* (1) * * * Unless an exception from the requirement to obtain certified cost or pricing data applies under 15.403–1(b)(1) or (b)(2), at a minimum, the contracting officer shall obtain appropriate data, without certification, on the prices at which the same or similar items have previously been sold and determine if the data is adequate for evaluating the reasonableness of the price. Price analysis may include evaluating data other than certified cost or pricing data obtained from the offeror or contractor when there is no other means for determining a fair and reasonable price. Contracting officers shall obtain data other than certified cost or pricing data from the offeror or contractor for all acquisitions (including commercial item acquisitions), if that is the contracting officer's only means to determine the price to be fair and reasonable.

(2) * * *

(i) * * * Normally, adequate price competition establishes a fair and reasonable price (see 15.403–1(c)(1)).

(ii) Comparison of the proposed prices to historical prices paid, whether by the Government or other than the Government, for the same or similar items. This method may be used for commercial items including those "of a type" or requiring minor modifications.

(A) The prior price must be a valid basis for comparison. If there has been a significant time lapse between the last acquisition and the present one, if the terms and conditions of the acquisition are significantly different, or if the reasonableness of the prior price is uncertain, then the prior price may not be a valid basis for comparison.

(B) The prior price must be adjusted to account for materially differing terms and conditions, quantities and market and economic factors. For similar items, the contracting officer must also adjust the prior price to account for material differences between the similar item and the item being procured.

(C) Expert technical advice should be obtained when analyzing similar items, or commercial items that are "of a type" or requiring minor modifications, to ascertain the magnitude of changes required and to assist in pricing the required changes.

* * * * *

(vii) Analysis of data other than certified cost or pricing data (as defined at 2.101) provided by the offeror.

* * * * *

(c) * * * (1) Cost analysis is the review and evaluation of any separate cost elements and profit or fee in an offeror's or contractor's proposal, as needed to determine a fair and reasonable price or to determine cost realism, and the application of judgment to determine how well the proposed costs represent what the cost of the contract should be, assuming reasonable economy and efficiency.

* * * * *

(2) * * *

(v) Review to determine whether any cost data or pricing data, necessary to make the offeror's proposal suitable for negotiation, have not been either submitted or identified in writing by the offeror. If there are such data, the contracting officer shall attempt to obtain and use them in the negotiations or make satisfactory allowance for the incomplete data.

* * * * *

(e) * * *

(3) The contracting officer should request technical assistance in evaluating pricing related to items that are "similar to" items being purchased, or commercial items that are "of a type" or requiring minor modifications, to ascertain the magnitude of changes required and to assist in pricing the required changes.

* * * * *

■ 17. Amend section 15.404–2 by—

■ a. Revising the section heading;

■ b. Removing from the second sentence in paragraph (a)(1) and the introductory text of paragraph (a)(2) "must" and adding "shall" in its place;

■ c. Revising the introductory text of paragraph (a)(2)(iii) and paragraph (a)(2)(iii)(F); and

■ d. Removing from the introductory text of paragraph (c)(1) "may" and adding "should" in its place.

The revised text reads as follows:

15.404–2 Data to support proposal analysis.

(a) * * *

(2) * * *

(iii) Information to help contracting officers determine commerciality and a fair and reasonable price, including—

* * * * *

(F) Identifying general market conditions affecting determinations of commerciality and a fair and reasonable price.

* * * * *

■ 18. Amend section 15.404–3 by—

■ a. Revising paragraphs (a) and (b)(3);

■ b. Revising the introductory text of paragraph (c);

■ c. Removing from the introductory text of paragraph (c)(1) "subcontractor(s), cost" and adding "subcontractor(s), certified cost" in its place;

■ d. Removing from paragraph (c)(1)(ii) "pertinent cost" and adding "pertinent certified cost" in its place;

■ e. Revising paragraph (c)(2);

■ f. Removing from paragraphs (c)(3) and (c)(4) "Subcontractor cost" and adding "Subcontractor certified cost" in its place; and

■ g. Removing from paragraph (c)(5) "Government cost" and adding "Government certified cost" in its place.

The revised text reads as follows:

15.404–3 Subcontract pricing considerations.

(a) The contracting officer is responsible for the determination of a fair and reasonable price for the prime contract, including subcontracting costs. The contracting officer should consider whether a contractor or subcontractor has an approved purchasing system, has performed cost or price analysis of proposed subcontractor prices, or has negotiated the subcontract prices before negotiation of the prime contract, in determining the reasonableness of the prime contract price. This does not relieve the contracting officer from the responsibility to analyze the contractor's submission, including subcontractor's certified cost or pricing data.

(b) * * *

(3) When required by paragraph (c) of this subsection, submit subcontractor certified cost or pricing data to the Government as part of its own certified cost or pricing data.

(c) Any contractor or subcontractor that is required to submit certified cost or pricing data also shall obtain and analyze certified cost or pricing data before awarding any subcontract, purchase order, or modification expected to exceed the certified cost or pricing data threshold, unless an exception in 15.403–1(b) applies to that action.

* * * * *

(2) The contracting officer should require the contractor or subcontractor to submit to the Government (or cause submission of) subcontractor certified cost or pricing data below the thresholds in paragraph (c)(1) of this subsection and data other than certified cost or pricing data that the contracting officer considers necessary for adequately pricing the prime contract.

* * * * *

■ 19. Amend section 15.406–2 by revising the introductory text of paragraph (a), and paragraph (e) to read as follows:

15.406–2 Certificate of current cost or pricing data.

(a) When certified cost or pricing data are required, the contracting officer shall require the contractor to execute a Certificate of Current Cost or Pricing Data, using the format in this paragraph, and must include the executed certificate in the contract file.

* * * * *

(e) If certified cost or pricing data are requested by the Government and submitted by an offeror, but an exception is later found to apply, the data shall not be considered certified cost or pricing data and shall not be certified in accordance with this subsection.

■ 20. Amend section 15.406–3 by revising paragraphs (a)(5) and (a)(6), and the second and third sentences of paragraph (a)(7) to read as follows:

15.406–3 Documenting the negotiation.

(a) * * *

(5) If certified cost or pricing data were not required in the case of any price negotiation exceeding the certified cost or pricing data threshold, the exception used and the basis for it.

(6) If certified cost or pricing data were required, the extent to which the contracting officer—

(i) Relied on the certified cost or pricing data submitted and used them in negotiating the price;

(ii) Recognized as inaccurate, incomplete, or noncurrent any certified cost or pricing data submitted; the action taken by the contracting officer and the contractor as a result; and the effect of the defective data on the price negotiated; or

(iii) Determined that an exception applied after the data were submitted and, therefore, considered not to be certified cost or pricing data.

(7) * * * Where the determination of a fair and reasonable price is based on cost analysis, the summary shall address each major cost element. When determination of a fair and reasonable price is based on price analysis, the summary shall include the source and type of data used to support the determination.

* * * * *

■ 21. Amend section 15.407–1 by—

■ a. Revising the section heading;

■ b. Removing from the first sentence in paragraph (a) "any cost" and adding "any certified cost" in its place;

■ c. Revising paragraph (b)(1);

■ d. Removing from paragraphs (b)(2) and (b)(3)(ii) "the cost" and adding "the certified cost" in its place;

■ e. Revising paragraph (b)(3)(iv);

■ f. Removing from paragraph (b)(4) "understated cost" and adding "understated certified cost" in its place;

■ g. Removing from paragraph (b)(5)(ii) "the cost" and adding "the certified cost" in its place;

■ h. Removing from the first sentence in paragraph (b)(7)(iii) "defective cost" and adding "defective certified cost" in its place;

■ i. Removing from the first sentence in paragraph (e) "Defective Cost" each time it appears (twice) and adding "Defective Certified Cost" in its place; and

■ j. Removing from the first sentence in the introductory text of paragraph (f) and the first sentence of paragraph (f)(2) "subcontractor cost" and adding "subcontractor certified cost" in its place.

The revised text reads as follows:

15.407–1 Defective certified cost or pricing data.

* * * * *

(b)(1) If, after award, certified cost or pricing data are found to be inaccurate,

incomplete, or noncurrent as of the date of final agreement on price or an earlier date agreed upon by the parties given on the contractor's or subcontractor's Certificate of Current Cost or Pricing Data, the Government is entitled to a price adjustment, including profit or fee, of any significant amount by which the price was increased because of the defective data. This entitlement is ensured by including in the contract one of the clauses prescribed in 15.408(b) and (c) and is set forth in the clauses at 52.215–10, Price Reduction for Defective Certified Cost or Pricing Data, and 52.215–11, Price Reduction for Defective Certified Cost or Pricing Data—Modifications. The clauses give the Government the right to a price adjustment for defects in certified cost or pricing data submitted by the contractor, a prospective subcontractor, or an actual subcontractor.

* * * * *

(3) * * *

(iv) Certified cost or pricing data were required; however, the contractor or subcontractor did not submit a Certificate of Current Cost or Pricing Data relating to the contract.

* * * * *

15.407–2 [Amended]

■ 22. Amend section 15.407–2 in paragraph (c)(1) by removing "requiring cost" and adding "requiring certified cost" in its place.

■ 23. Amend section 15.407–3 by revising paragraph (a) to read as follows:

15.407–3 Forward pricing rate agreements.

(a) When certified cost or pricing data are required, offerors are required to describe any forward pricing rate agreements (FPRAs) in each specific pricing proposal to which the rates apply and to identify the latest cost or pricing data already submitted in accordance with the FPRA. All data submitted in connection with the FPRA, updated as necessary, form a part of the total data that the offeror certifies to be accurate, complete, and current at the time of agreement on price for an initial contract or for a contract modification. (See the Certificate of Current Cost or Pricing Data at 15.406–2.)

* * * * *

■ 24. Amend section 15.408 by—

■ a. Revising paragraphs (b), (c), (d), (e), and (g);

■ b. Removing from paragraph (j) "that cost" and adding "that certified cost" in its place;

■ c. Revising paragraph (k), the introductory text of paragraph (l), and paragraphs (l)(1), (l)(4), and (m); and

■ d. In Table 15–2, which follows paragraph (n), by—

■ 1. Revising the table heading, the introductory text, and Notes 1 and 2;

■ 2. Revising the first sentence of paragraph B., and paragraph C. of the *I. General Instructions;* and

■ 3. Revising the introductory text of paragraph A. and paragraph A.(2) of the *II. Cost Elements.*

The revised text reads as follows:

15.408 Solicitation provisions and contract clauses.

* * * * *

(b) *Price Reduction for Defective Certified Cost or Pricing Data.* The contracting officer shall, when contracting by negotiation, insert the clause at 52.215–10, Price Reduction for Defective Certified Cost or Pricing Data, in solicitations and contracts when it is contemplated that certified cost or pricing data will be required from the contractor or any subcontractor (see 15.403–4).

(c) *Price Reduction for Defective Certified Cost or Pricing Data—Modifications.* The contracting officer shall, when contracting by negotiation, insert the clause at 52.215–11, Price Reduction for Defective Certified Cost or Pricing Data—Modifications, in solicitations and contracts when it is contemplated that certified cost or pricing data will be required from the contractor or any subcontractor (see 15.403–4) for the pricing of contract modifications, and the clause prescribed in paragraph (b) of this section has not been included.

(d) *Subcontractor Certified Cost or Pricing Data.* The contracting officer shall insert the clause at 52.215–12, Subcontractor Certified Cost or Pricing Data, in solicitations and contracts when the clause prescribed in paragraph (b) of this section is included.

(e) *Subcontractor Certified Cost or Pricing Data—Modifications.* The contracting officer shall insert the clause at 52.215–13, Subcontractor Certified Cost or Pricing Data—Modifications, in solicitations and contracts when the clause prescribed in paragraph (c) of this section is included.

* * * * *

(g) *Pension Adjustments and Asset Reversions.* The contracting officer shall insert the clause at 52.215–15, Pension Adjustments and Asset Reversions, in solicitations and contracts for which it is anticipated that certified cost or pricing data will be required or for which any preaward or postaward cost determinations will be subject to part 31.

* * * * *

(k) *Notification of Ownership Changes.* The contracting officer shall insert the clause at 52.215–19, Notification of Ownership Changes, in solicitations and contracts for which it is contemplated that certified cost or pricing data will be required or for which any preaward or postaward cost determination will be subject to subpart 31.2.

(l) *Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data.* Considering the hierarchy at 15.402, the contracting officer shall insert the provision at 52.215–20, Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data, in solicitations if it is reasonably certain that certified cost or pricing data or data other than certified cost or pricing data will be required. This provision also provides instructions to offerors on how to request an exception from the requirement to submit certified cost or pricing data. The contracting officer shall—

(1) Use the provision with its Alternate I to specify a format for certified cost or pricing data other than the format required by Table 15–2 of this section;

* * * * *

(4) Replace the basic provision with its Alternate IV if certified cost or pricing data are not expected to be required because an exception may apply, but data other than certified cost or pricing data will be required as described in 15.403–3.

(m) *Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data—Modifications.* Considering the hierarchy at 15.402, the contracting officer shall insert the clause at 52.215–21, Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data—Modifications, in solicitations and contracts if it is reasonably certain that certified cost or pricing data or data other than certified cost or pricing data will be required for modifications. This clause also provides instructions to contractors on how to request an exception from the requirement to submit certified cost or pricing data. The contracting officer shall—

(1) Use the clause with its Alternate I to specify a format for certified cost or pricing data other than the format required by Table 15–2 of this section;

(2) Use the clause with its Alternate II if copies of the proposal are to be sent to the ACO and contract auditor;

(3) Use the clause with its Alternate III if submission via electronic media is required; and

(4) Replace the basic clause with its Alternate IV if certified cost or pricing data are not expected to be required because an exception may apply, but data other than certified cost or pricing data will be required as described in 15.403–3.

* * * * *

Table 15–2—Instructions for Submitting Cost/Price Proposals When Certified Cost or Pricing Data Are Required

This document provides instructions for preparing a contract pricing proposal when certified cost or pricing data are required.

Note 1: There is a clear distinction between submitting certified cost or pricing data and merely making available books, records, and other documents without identification. The requirement for submission of certified cost or pricing data is met when all accurate certified cost or pricing data reasonably available to the offeror have been submitted, either actually or by specific identification, to the Contracting Officer or an authorized representative. As later data come into your possession, it should be submitted promptly to the Contracting Officer in a manner that clearly shows how the data relate to the offeror's price proposal. The requirement for submission of certified cost or pricing data continues up to the time of agreement on price, or an earlier date agreed upon between the parties if applicable.

Note 2: By submitting your proposal, you grant the Contracting Officer or an authorized representative the right to examine records that formed the basis for the pricing proposal. That examination can take place at any time before award. It may include those books, records, documents, and other types of factual data (regardless of form or whether the data are specifically referenced or included in the proposal as the basis for pricing) that will permit an adequate evaluation of the proposed price.

I. General Instructions

* * * * *

B. In submitting your proposal, you must include an index, appropriately referenced, of all the certified cost or pricing data and information accompanying or identified in the proposal. * * *

C. As part of the specific information required, you must submit, with your proposal—

(1) Certified cost or pricing data (as defined at FAR 2.101). You must clearly identify on your cover sheet that certified cost or pricing data are included as part of the proposal.

(2) Information reasonably required to explain your estimating process, including—

(i) The judgmental factors applied and the mathematical or other methods used in the estimate, including those used in projecting from known data; and

(ii) The nature and amount of any contingencies included in the proposed price.

* * * * *

II. Cost Elements

* * * * *

A. *Materials and services.* Provide a consolidated priced summary of individual material quantities included in the various tasks, orders, or contract line items being proposed and the basis for pricing (vendor quotes, invoice prices, etc.). Include raw materials, parts, components, assemblies, and services to be produced or performed by others. For all items proposed, identify the item and show the source, quantity, and price. Conduct price analyses of all subcontractor proposals. Conduct cost analyses for all subcontracts when certified cost or pricing data are submitted by the subcontractor. Include these analyses as part of your own certified cost or pricing data submissions for subcontracts expected to exceed the appropriate threshold in FAR 15.403–4. Submit the subcontractor certified cost or pricing data and data other than certified cost or pricing data as part of your own certified cost or pricing data as required in paragraph IIA(2) of this table. These requirements also apply to all subcontractors if required to submit certified cost or pricing data.

* * * * *

(2) *All Other.* Obtain certified cost or pricing data from prospective sources for those acquisitions (such as subcontracts, purchase orders, material order, etc.) exceeding the threshold set forth in FAR 15.403–4 and not otherwise exempt, in accordance with FAR 15.403–1(b) (*i.e.,* adequate price competition, commercial items, prices set by law or regulation or waiver). Also provide data showing the basis for establishing source and reasonableness of price. In addition, provide a summary of your cost analysis and a copy of certified cost or pricing data submitted by the prospective source in support of each subcontract, or purchase order that is the lower of either $12.5 million or more, or both more than the pertinent certified cost or pricing data threshold and more than 10 percent of the prime contractor's proposed price. Also submit any information reasonably required to explain your estimating process (including the judgmental factors applied and the mathematical or other methods used in the estimate, including those used in projecting from known data, and the nature and amount of any contingencies included in the price). The Contracting Officer may require you to submit cost or pricing data in support of proposals in lower amounts. Subcontractor certified cost or pricing data must be accurate, complete and current as of the date of final price agreement, or an earlier date agreed upon by the parties, given on the prime contractor's Certificate of Current Cost or Pricing Data. The prime contractor is responsible for updating a prospective subcontractor's data. For standard commercial items fabricated by the offeror that are generally stocked in inventory, provide a separate cost breakdown, if priced based on cost. For interorganizational transfers priced at cost, provide a separate breakdown of cost elements. Analyze the certified cost or pricing data and submit the results of your analysis of the prospective source's proposal. When submission of a prospective source's certified cost or pricing data is required as described in this paragraph, it must be included as part of your own certified cost or pricing data. You must also submit any data other than certified cost or pricing data obtained from a subcontractor, either actually or by specific identification, along with the results of any analysis performed on that data.

* * * * *

PART 16—TYPES OF CONTRACTS

16.202–2 [Amended]

■ 25. Amend section 16.202–2 by removing from paragraph (b) "valid cost" and adding "valid certified cost" in its place.

■ 26. Amend section 16.203–2 by revising paragraph (b) to read as follows:

16.203–2 Application.

* * * * *

(b) In contracts that do not require submission of certified cost or pricing data, the contracting officer shall obtain adequate data to establish the base level from which adjustment will be made and may require verification of data submitted.

■ 27. Amend section 16.603–2 by revising the first sentence of paragraph (c) to read as follows:

16.603–2 Application.

* * * * *

(c) Each letter contract shall, as required by the clause at 52.216–25, Contract Definitization, contain a negotiated definitization schedule including (1) dates for submission of the contractor's price proposal, required certified cost or pricing data and data

other than certified cost or pricing data; and, if required, make-or-buy and subcontracting plans, (2) a date for the start of negotiations, and (3) a target date for definitization, which shall be the earliest practicable date for definitization. * * *

* * * * *

■ 28. Amend section 16.603–4 by revising the second sentence of paragraph (b)(3) to read as follows:

16.603–4 Contract clauses.

* * * * *

(b) * * *

(3) * * * If at the time of entering into the letter contract, the contracting officer knows that the definitive contract will be based on adequate price competition or will otherwise meet the criteria of 15.403–1 for not requiring submission of certified cost or pricing data, the words "and certified cost or pricing data in accordance with FAR 15.408, Table 15–2 supporting its proposal" may be deleted from paragraph (a) of the clause. * * *

* * * * *

PART 19—SMALL BUSINESS PROGRAMS

■ 29. Amend section 19.705–4 by—

■ a. Removing from the introductory text and paragraph (a) introductory text "must" and adding "shall" in its place; and

■ b. Revising paragraph (d)(3) to read as follows:

19.705–4 Reviewing the subcontracting plan.

* * * * *

(d) * * *

(3) Ensure that the subcontracting goals are consistent with the offeror's certified cost or pricing data or data other than certified cost or pricing data.

* * * * *

■ 30. Amend section 19.806 by revising the second and third sentences of paragraph (a) to read as follows:

19.806 Pricing the 8(a) contract.

(a) * * * If required by subpart 15.4, the SBA shall obtain certified cost or pricing data from the 8(a) contractor. If the SBA requests audit assistance to determine the proposed price to be fair and reasonable in a sole source acquisition, the contracting activity shall furnish it to the extent it is available.

* * * * *

19.807 [Amended]

■ 31. Amend section 19.807 by removing from paragraph (b) "including cost" and adding "including certified cost" in its place.

PART 27—PATENTS, DATA, AND COPYRIGHTS

27.202–5 [Amended]

■ 32. Amend section 27.202–5 by removing from paragraph (a)(1)(i) "which cost" and adding "which certified cost" in its place.

PART 30—COST ACCOUNTING STANDARDS ADMINISTRATION

30.201–5 [Amended]

■ 33. Amend section 30.201–5 in paragraph (c)(6) by removing "Whether cost" and adding "Whether certified cost" in its place.

PART 31—CONTRACT COST PRINCIPLES AND PROCEDURES

31.205–6 [Amended]

■ 34. Amend section 31.205–6 in paragraph (j)(3)(i)(B), the second sentence of paragraph (j)(3)(ii), and the second sentence of paragraph (o)(5) by removing "which cost" and adding "which certified cost" in its place.

PART 32—CONTRACT FINANCING

32.601 [Amended]

■ 35. Amend section 32.601 in paragraph (b)(2) by removing "defective cost" and adding "defective certified cost" in its place.

32.607–2 [Amended]

■ 36. Amend section 32.607–2 in paragraph (g)(3) by removing "Defective Cost" and adding "Defective Certified Cost" in its place.

PART 33—PROTESTS, DISPUTES, AND APPEALS

33.207 [Amended]

■ 37. Amend section 33.207 in paragraph (d) by removing "regarding cost" and adding "regarding certified cost" in its place.

PART 36—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

■ 38. Amend section 36.214 by—

■ a. Revising the introductory text of paragraph (b); and

■ b. Removing from paragraph (b)(1) "of cost" and adding "of certified cost" in its place.

■ The revised text reads as follows:

36.214 Special procedures for price negotiation in construction contracting.

* * * * *

(b) The contracting officer shall evaluate proposals and associated certified cost or pricing data and data other than certified cost or pricing data and shall compare them to the Government estimate.

* * * * *

PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES

42.705–1 [Amended]

■ 39. Amend section 42.705–1 in paragraph (b)(5)(iii) by giving separate indention to paragraphs (b)(5)(iii)(A), (B), (C), and (D) and by removing from (b)(5)(iii)(D) "of cost" and adding "of certified cost" in its place.

■ 40. Amend section 42.1304 by revising paragraph (d) to read as follows:

42.1304 Government delay of work.

* * * * *

(d) The contracting officer shall retain in the file a record of all negotiations leading to any adjustment made under the clause, and related certified cost or pricing data, or data other than certified cost or pricing data.

■ 41. Amend section 42.1701 by—

■ a. In paragraph (b), revising the first sentence, and removing the last sentence; and

■ b. Revising the second sentence of paragraph (c). The revised text reads as follows:

42.1701 Procedures.

* * * * *

(b) The ACO shall obtain the contractor's forward pricing rate proposal and require that it include cost or pricing data that are accurate, complete, and current as of the date of submission (but see 15.407–3(c)). * * *

(c) * * * The agreement shall provide for cancellation at the option of either party and shall require the contractor to submit to the ACO and to the cognizant contract auditor any significant change in cost or pricing data used to support the FPRA.

* * * * *

PART 44—SUBCONTRACTING POLICIES AND PROCEDURES

■ 42. Amend section 44.202–2 by revising paragraph (a)(8) to read as follows:

44.202–2 Considerations.

(a) * * *

(8) Has the contractor performed adequate cost or price analysis or price comparisons and obtained certified cost or pricing data and data other than certified cost or pricing data?

* * * * *

■ 43. Amend section 44.303 by revising paragraph (c) to read as follows:

44.303 Extent of review.

* * * * *

(c) Pricing policies and techniques, including methods of obtaining certified cost or pricing data, and data other than certified cost or pricing data;

* * * * *

44.305–3 [Amended]

■ 44. Amend section 44.305–3 in paragraph (a)(1) by removing "Cost" and adding "Certified cost" in its place.

PART 45—GOVERNMENT PROPERTY

45.104 [Amended]

■ 45. Amend section 45.104 by removing from paragraph (a)(4) "of cost" and adding "of certified cost" in its place.

PART 49—TERMINATION OF CONTRACTS

49.603–1 [Amended]

■ 46. Amend section 49.603–1 in paragraph (b)(7)(x) of the agreement by removing "defective cost" and adding "defective certified cost" in its place.

49.603–2 [Amended]

■ 47. Amend section 49.603–2 in paragraph (b)(8)(vii) of the agreement by removing "defective cost" and adding "defective certified cost" in its place.

49.603–3 [Amended]

■ 48. Amend section 49.603–3 in paragraph (b)(7)(xv) of the agreement by removing "defective cost" and adding "defective certified cost" in its place.

49.603–4 [Amended]

■ 49. Amend section 49.603–4 in paragraph (b)(4)(viii) of the agreement by removing "defective cost" and adding "defective certified cost" in its place.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 50. Amend section 52.214–26 by—

■ a. Revising the date of the clause;

■ b. Revising the introductory text of paragraph (b); and

■ c. Removing from paragraph (e) "of cost" and adding "of certified cost" in its place.

The revised text reads as follows:

52.214–26 Audit and Records—Sealed Bidding.

* * * * *

Audit and Records—Sealed Bidding (Oct 2010)

* * * * *

(b) *Certified cost or pricing data.* If the Contractor has been required to submit certified cost or pricing data in connection with the pricing of any modification to this contract, the Contracting Officer, or an authorized representative of the Contracting Officer, in order to evaluate the accuracy, completeness, and currency of the certified cost or pricing data, shall have the right to examine and audit all of the Contractor's records, including computations and projections, related to—

* * * * *

■ 51. Amend section 52.214–27 by—

■ a. Revising the section heading;

■ b. Revising the clause heading and date of the clause;

■ c. Removing from paragraph (a) "of cost" and adding "of certified cost" in its place;

■ d. Removing from paragraph (b) "furnished cost" and adding "furnished certified cost" in its place; removing "Contractor cost" and adding "Contractor certified cost" in its place; and removing "(a) above" and adding "(a) of this clause" in its place;

■ e. Removing from paragraph (c) "(b) above" and adding "(b) of this clause" in its place, and removing "defective cost" and adding "defective certified cost" in its place;

■ f. Removing from paragraph (d)(1)(i) "current cost" and adding "current certified cost" in its place; and removing from paragraph (d)(1)(ii) "the cost" and adding "the certified cost" in its place;

■ g. Removing from paragraph (d)(2)(i)(B) "the cost" and adding "the certified cost" in its place; and

■ h. Removing from paragraph (e)(2) "submitted cost" and adding "submitted certified cost" in its place;

The revised text reads as follows:

52.214–27 Price Reduction for Defective Certified Cost or Pricing Data—Modifications—Sealed Bidding.

* * * * *

Price Reduction for Defective Certified Cost or Pricing Data—Modifications—Sealed Bidding (Oct 2010)

* * * * *

■ 52. Amend section 52.214–28 by—

■ a. Revising the section heading;

■ b. Revising the clause heading and date of the clause;

■ c. Giving separate indention to paragraphs (a)(1) and (2) and by removing from paragraph (a)(1) "of cost" and adding "of certified cost" in its place;

■ d. Revising paragraph (b); and

■ e. Removing from paragraph (d) "of cost" and adding "of certified cost" in its place.

The revised text reads as follows:

52.214–28 Subcontractor Certified Cost or Pricing Data—Modifications—Sealed Bidding.

* * * * *

Subcontractor Certified Cost or Pricing Data—Modifications—Sealed Bidding (Oct 2010)

* * * * *

(b) Before awarding any subcontract expected to exceed the threshold for submission of certified cost or pricing data at FAR 15.403–4(a)(1), on the date of agreement on price or the date of award, whichever is later, or before pricing any subcontract modifications involving aggregate increases and/or decreases in costs, plus applicable profits, expected to exceed the threshold for submission of certified cost or pricing data at FAR 15.403–4(a)(1), the Contractor shall require the subcontractor to submit certified cost or pricing data (actually or by specific identification in writing), as part of the subcontractor's proposal in accordance with FAR 15.408, Table 15–2 (to include any information reasonably required to explain the subcontractor's estimating process such as the judgmental factors applied and the mathematical or other methods used in the estimate, including those used in projecting from known data, and the nature and amount of any contingencies included in the price), unless an exception under FAR 15.403–1(b) applies.

* * * * *

■ 53. Amend section 52.215–2 by—

■ a. Revising the date of the clause;

■ b. Revising the introductory text of paragraph (c); and

■ c. Removing from introductory text of paragraph (g) "paragraph (a)" and adding "paragraph (g)" in its place; and removing from paragraph (g)(2) "which cost" and adding "which certified cost" in its place.

The revised text reads as follows:

52.215–2 Audit and Records-Negotiation.

* * * * *

Audit and Records—Negotiation (Oct 2010)

* * * * *

(c) *Certified cost or pricing data.* If the Contractor has been required to submit certified cost or pricing data in connection with any pricing action relating to this contract, the Contracting Officer, or an authorized representative of the Contracting Officer, in order to evaluate the accuracy, completeness, and currency of the certified cost or pricing data, shall have the right to examine and audit all of the Contractor's records, including computations and projections, related to—

* * * * *

■ 54. Amend section 52.215–9 by—

■ a. Revising the date of *Alternate I* and paragraph (d)(1); and

■ b. Revising the date of *Alternate II* and paragraph (d)(1).

The revised text reads as follows:

52.215–9 Changes or Additions to Make-or-Buy Program.

* * * * *

Alternate I (Oct 2010). * * *

(d) * * *

(1) Support its proposal with certified cost or pricing data in accordance with FAR 15.408, Table 15–2 when required by FAR 15.403, and data other than certified cost or pricing data, to permit evaluation; and

* * * * *

Alternate II (Oct 2010). * * *

(d) * * *

(1) Support its proposal with certified cost or pricing data in accordance with FAR 15.408, Table 15–2, when required by FAR 15.403, and data other than certified cost or pricing data, to permit evaluation; and

* * * * *

■ 55. Amend section 52.215–10 by—
■ a. Revising the section heading;
■ b. Revising the clause heading and date of the clause;
■ c. Removing from paragraph (a)(1) "furnished cost" and adding "furnished certified cost" in its place, and removing from paragraph (a)(2) "Contractor cost" and adding "Contractor certified cost" in its place;
■ d. Revising paragraph (b);
■ e. Removing from paragraph (c)(1)(i) "current cost" and adding "current certified cost" in its place, and removing from paragraphs (c)(1)(ii) and (c)(2)(i)(B) "the cost" and adding "the certified cost" in its place; and
■ f. Removing from paragraph (d)(2) "submitted cost" and adding "submitted certified cost" in its place.

The revised text reads as follows:

52.215–10 Price Reduction for Defective Certified Cost or Pricing Data.

* * * * *

Price Reduction for Defective Certified Cost or Pricing Data (Oct 2010)

* * * * *

(b) Any reduction in the contract price under paragraph (a) of this clause due to defective data from a prospective subcontractor that was not subsequently awarded the subcontract shall be limited to the amount, plus applicable overhead and profit markup, by which (1) the actual subcontract or (2) the actual cost to the Contractor, if there was no subcontract, was less than the prospective subcontract cost estimate submitted by the Contractor; provided, that the actual subcontract price was not itself affected by defective certified cost or pricing data.

* * * * *

■ 56. Amend section 52.215–11 by—
■ a. Revising the section heading;
■ b. Revising the clause heading and date of the clause;
■ c. Removing from paragraph (a) "of cost" and adding "of certified cost" in its place;
■ d. Removing from paragraph (b) "furnished cost" and adding "furnished certified cost" in its place; and removing "Contractor cost" and adding "Contractor certified cost" in its place;
■ e. Revising paragraph (c);
■ f. Removing from paragraph (d)(1)(i) "current cost" and adding "current certified cost" in its place; and removing from paragraphs (d)(1)(ii) and (d)(2)(i)(B) "the cost" and adding "the certified cost" in its place; and
■ g. Removing from paragraph (e)(2) "submitted cost" and adding "submitted certified cost" in its place.

The revised text reads as follows:

52.215–11 Price Reduction for Defective Certified Cost or Pricing Data—Modifications.

* * * * *

Price Reduction for Defective Certified Cost or Pricing Data—Modifications (Oct 2010)

* * * * *

(c) Any reduction in the contract price under paragraph (b) of this clause due to defective data from a prospective subcontractor that was not subsequently awarded the subcontract shall be limited to the amount, plus applicable overhead and profit markup, by which (1) the actual subcontract or (2) the actual cost to the Contractor, if there was no subcontract, was less than the prospective subcontract cost estimate submitted by the Contractor; provided, that the actual subcontract price was not itself affected by defective certified cost or pricing data.

* * * * *

■ 57. Amend section 52.215–12 by—
■ a. Revising the section heading;
■ b. Revising the clause heading and date of the clause;
■ c. Revising paragraph (a);
■ d. Removing from the introductory text of paragraph (c) and paragraph (c)(1) "of cost" and adding "of certified cost" in its place; and
■ e. Removing from paragraph (c)(2) "Subcontractor Cost" and adding "Subcontractor Certified Cost" in its place.

The revised text reads as follows:

52.215–12 Subcontractor Certified Cost or Pricing Data.

* * * * *

Subcontractor Certified Cost or Pricing Data (Oct 2010)

* * * * *

(a) Before awarding any subcontract expected to exceed the threshold for submission of certified cost or pricing data at FAR 15.403–4, on the date of agreement on price or the date of award, whichever is later; or before pricing any subcontract modification involving a pricing adjustment expected to exceed the threshold for submission of certified cost or pricing data at FAR 15.403–4, the Contractor shall require the subcontractor to submit certified cost or pricing data (actually or by specific identification in writing), in accordance with FAR 15.408, Table 15–2 (to include any information reasonably required to explain the subcontractor's estimating process such as the judgmental factors applied and the mathematical or other methods used in the estimate, including those used in projecting from known data, and the nature and amount of any contingencies included in the price), unless an exception under FAR 15.403–1 applies.

* * * * *

■ 58. Amend section 52.215–13 by—
■ a. Revising the section heading;
■ b. Revising the clause heading and date of the clause;
■ c. Removing from paragraph (a)(1) "of cost" and adding "of certified cost" in its place;
■ d. Revising paragraph (b); and
■ e. Removing from paragraph (d) "of cost" and adding "of certified cost" in its place;

The revised text reads as follows:

52.215–13 Subcontractor Certified Cost or Pricing Data—Modifications.

* * * * *

Subcontractor Certified Cost or Pricing Data—Modifications (Oct 2010)

* * * * *

(b) Before awarding any subcontract expected to exceed the threshold for submission of certified cost or pricing data at FAR 15.403–4, on the date of agreement on price or the date of award, whichever is later; or before pricing any subcontract modification involving a pricing adjustment expected to exceed the threshold for submission of certified cost or pricing data at FAR 15.403–4, the Contractor shall require the subcontractor to submit certified cost or pricing data (actually or by specific identification in writing), in accordance with FAR 15.408, Table 15–2 (to include any information reasonably required to explain the subcontractor's estimating process such as the judgmental factors applied and the mathematical or other methods used in the estimate, including those used in projecting from known data, and the nature and amount of any contingencies included in the price), unless an exception under FAR 15.403–1 applies.

* * * * *

52.215–14 [Amended]

■ 59. Amend section 52.215–14 by—
■ a. Revising the date of the clause to read "(Oct 2010)"; and
■ b. Removing from the last sentence of paragraph (a) "of cost" and adding "of certified cost" in its place.

52.215–15 [Amended]

■ 60. Amend section 52.215–15 by revising the date of the clause to read "(Oct 2010)"; and removing from paragraph (b)(2) and the second sentence of paragraph (c) "which cost"

and adding "which certified cost" in its place.

■ 61. Amend section 52.215–20 by—

■ a. Revising the section heading;

■ b. Revising the provision heading and date of the provision;

■ c. Revising the introductory text of paragraph (a); and removing from the first sentence of paragraph (a)(1) "submitting cost" and adding "submitting certified cost" in its place;

■ d. Revising the introductory text of paragraph (b) and paragraph (b)(1);

■ e. Revising *Alternate I;* and

■ f. Revising the date of *Alternate IV* and paragraphs (a) and (b).

The revised text reads as follows:

52.215–20 Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data.

* * * * *

Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data (Oct 2010)

(a) *Exceptions from certified cost or pricing data.*

* * * * *

(b) *Requirements for certified cost or pricing data.* If the offeror is not granted an exception from the requirement to submit certified cost or pricing data, the following applies:

(1) The offeror shall prepare and submit certified cost or pricing data, data other than certified cost or pricing data, and supporting attachments in accordance with the instructions contained in Table 15–2 of FAR 15.408, which is incorporated by reference with the same force and effect as though it were inserted here in full text. The instructions in Table 15–2 are incorporated as a mandatory format to be used in this contract, unless the Contracting Officer and the Contractor agree to a different format and change this clause to use Alternate I.

* * * * *

Alternate I (Oct 2010). As prescribed in 15.408(1) (and see 15.403–5(b)(1)), substitute the following paragraph (b)(1) for paragraph (b)(1) of the basic provision:

(b)(1) The offeror shall submit certified cost or pricing data, data other than certified cost or pricing data, and supporting attachments in the following format: *[Insert description of the data and format that are required, and include access to records necessary to permit an adequate evaluation of the proposed price in accordance with 15.408, Table 15–2, Note 2. The description may be inserted at the time of issuing the solicitation, or the Contracting Officer may specify that the offeror's format will be acceptable, or the description may be inserted as the result of negotiations.]*

* * * * *

Alternate IV (Oct 2010). * * *

(a) Submission of certified cost or pricing data is not required.

(b) Provide data described below: *[Insert description of the data and the format that are required, including the access to records necessary to permit an adequate evaluation of the proposed price in accordance with 15.403–3.]*

■ 62. Amend section 52.215–21 by—

■ a. Revising the section heading;

■ b. Revising the clause heading and date of the clause;

■ c. Revising the introductory text of paragraph (a); and removing from the introductory text of paragraph (a)(1) "submitting cost" and adding "submitting certified cost" in its place;

■ d. Removing from paragraph (a)(1)(ii)(A)(*1*) "from cost" and adding "from certified cost" in its place;

■ e. Revising the introductory text of paragraph (b) and paragraph (b)(1);

■ f. Revising *Alternate I;* and

■ g. Revising the date of *Alternate IV* and paragraphs (a) and (b).

The revised text reads as follows:

52.215–21 Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data—Modifications.

* * * * *

Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data—Modifications (Oct 2010)

(a) *Exceptions from certified cost or pricing data.*

* * * * *

(b) *Requirements for certified cost or pricing data.* If the Contractor is not granted an exception from the requirement to submit certified cost or pricing data, the following applies:

(1) The Contractor shall submit certified cost or pricing data, data other than certified cost or pricing data, and supporting attachments in accordance with the instructions contained in Table 15–2 of FAR 15.408, which is incorporated by reference with the same force and effect as though it were inserted here in full text. The instructions in Table 15–2 are incorporated as a mandatory format to be used in this contract, unless the Contracting Officer and the Contractor agree to a different format and change this clause to use Alternate I.

* * * * *

Alternate I (Oct 2010). As prescribed in 15.408(m) and 15.403–5(b)(1), substitute the following paragraph (b)(1) for paragraph (b)(1) of the basic clause.

(b)(1) The Contractor shall submit certified cost or pricing data, data other than certified cost or pricing data, and supporting attachments prepared in the following format: *[Insert description of the data and format that are required and include access to records necessary to permit an adequate evaluation of the proposed price in accordance with 15.408, Table 15–2, Note 2. The description may be inserted at the time of issuing the solicitation, or the Contracting Officer may specify that the offeror's format will be acceptable, or the description may be inserted as the result of negotiations.]*

* * * * *

Alternate IV (Oct 2010). * * *

(a) Submission of certified cost or pricing data is not required.

(b) Provide data described below: *[Insert description of the data and the format that are required, including the access to records necessary to permit an adequate evaluation of the proposed price in accordance with 15.403–3.]*

■ 63. Amend section 52.216–25 by—

■ a. Revising the date of the clause;

■ b. Revising paragraph (a); and

■ c. Removing from the paragraph (b) "*and cost*" and adding "*and certified cost*" in its place.

The revised text reads as follows:

52.216–25 Contract Definitization.

* * * * *

Contract Definitization (Oct 2010)

(a) A ____ *[insert specific type of contract]* definitive contract is contemplated. The Contractor agrees to begin promptly negotiating with the Contracting Officer the terms of a definitive contract that will include (1) all clauses required by the Federal Acquisition Regulation (FAR) on the date of execution of the letter contract, (2) all clauses required by law on the date of execution of the definitive contract, and (3) any other mutually agreeable clauses, terms, and conditions. The Contractor agrees to submit a ____ *[insert specific type of proposal (e.g., fixed-price or cost-and-fee)]* proposal, including data other than certified cost or pricing data, and certified cost or pricing data, in accordance with FAR 15.408, Table 15–2, supporting its proposal.

* * * * *

52.230–2 [Amended]

■ 64. Amend section 52.230–2 by revising the date of the clause to read "(Oct 2010)"; and removing from the first sentences of paragraphs (a)(3) and (d) "submitted cost" and adding "submitted certified cost" in its place.

52.230–5 [Amended]

■ 65. Amend section 52.230–5 by revising the date of the clause to read "(Oct 2010)"; and removing from the first sentence of paragraph (a)(3) and the introductory text of paragraph (d) "submitted cost" and adding "submitted certified cost" in its place.

52.232–17 [Amended]

■ 66. Amend section 52.232–17 by revising the date of the clause to read "(Oct 2010)"; and removing from the first sentence of paragraph (a) "Defective Cost" and adding "Defective Certified Cost" in its place.

52.244–2 [Amended]

■ 67. Amend section 52.244–2 by—

■ a. Revising the date of the clause to read "(Oct 2010)";
■ b. Removing from paragraph (e)(1)(v) "accurate cost" and adding "accurate certified cost" in its place;
■ c. Removing from paragraph (e)(1)(vii)(C) "reason cost" and adding "reason certified cost" in its place; and
■ d. Removing from paragraphs (e)(1)(vii)(D) and (e)(1)(vii)(E) "subcontractor's cost" and adding "subcontractor's certified cost" in its place.

[FR Doc. 2010–21026 Filed 8–27–10; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 5, 25, and 52

[FAC 2005–45; FAR Case 2009–008; Item III; Docket 2009–0008, Sequence 1]

RIN 9000–AL22

Federal Acquisition Regulation; American Recovery and Reinvestment Act of 2009 (the Recovery Act)—Buy American Requirements for Construction Material

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) have adopted as final, with changes, an interim rule amending the Federal Acquisition Regulation (FAR) to implement the American Recovery and Reinvestment Act of 2009 (Recovery Act) with respect to the "Buy American—Recovery Act" provision, section 1605 in Division A.

DATES: *Effective Date:* October 1, 2010.

Applicability Date: The rule applies to solicitations issued and contracts awarded on or after the effective date of this rule. Contracting officers shall modify, on a bilateral basis, in accordance with FAR 1.108(d)(3), existing contracts to include the appropriate FAR clause for future work, if Recovery Act funds will be used. In the event that a contractor refuses to accept such a modification, the contractor will not be eligible for award of any work that uses Recovery Act funds.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Ms. Cecelia L. Davis, Procurement Analyst, at (202) 219–0202. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–45, FAR case 2009–008.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule implements the unique "Buy American—Recovery Act" provision, section 1605 of the Recovery Act, by revising FAR subpart 25.6, and related provisions and clauses at FAR part 52, with conforming changes to FAR subparts 2.1, 5.2, 25.0, and 25.11. An interim rule was published in the **Federal Register** at 74 FR 14623, March 31, 2009. The public comment period ended June 1, 2009.

As required by section 1605, the final rule makes it clear that there will be full compliance with U.S. obligations under all international trade agreements when undertaking construction covered by such agreements with Recovery Act funds. The new required provisions and clauses implement U.S. obligations under our trade agreements in the same way as they are currently implemented in non-Recovery Act construction contracts. The Caribbean Basin countries are excluded from the definition of "Recovery Act designated country," because the treatment provided to them is not as a result of a U.S. international obligation.

B. Discussion and Analysis

The Regulatory Secretariat received 35 responses, but 2 responses lacked attached comments and 1 response appeared unrelated to the case. The responses included multiple comments on a wide range of issues addressed in the interim rule. Each issue is discussed by topic in the following sections.

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1. Comments on Section 1605 of the Recovery Act

Comments: Although the respondents expressed general support for the goals of the Recovery Act to stimulate the U.S. economy, many were concerned about the Recovery Act Buy American restrictions of section 1605. For example:

Several entities representing other countries objected to the potential restrictions on trade. They alleged that the Recovery Act Buy American requirement in section 1605 is not in conformity with the U.S. pledge to refrain from raising new barriers in the framework of the Summit on Financial Markets and the World Economy, November 2008, and the G20 pledge, April 2009. They alleged that it will have a negative impact on the world trade and economy. One respondent stated that it is not rational for the U.S. to take trade protection actions such as the "Buy American—Recovery Act" provision, because it will not be useful for the American and global economy in promoting recovery from the current downturn. Another respondent stated that, to the extent 1605 imposes more restrictive requirements than previously existed, it represents a new barrier to trade in goods between the United States and Canada. One respondent found several aspects of section 1605 problematic because of their "inherent lack of clarity."

Some United States industry associations also had concerns about section 1605. One objected that the real-life burdens of complying with these country-of-origin requirements cannot be overstated. This respondent concluded that, where the U.S. Government places a premium on

promoting its important socio-economic goals, this requires companies interested in selling in the Federal marketplace to segregate their inventories based on country of origin and implement costly compliance regimes. Another respondent noted a risk that the Recovery Act Buy American provisions may have numerous unintended consequences on the United States and harm American workers and companies and the global economy. A third respondent commented that "Congress' well-meaning intentions, like all protectionist measures, could inadvertently hurt the downstream U.S. users."

Response: Comments on the merits of section 1605 of the Recovery Act are outside the scope of this case, because the Councils cannot change the law.

This final rule is focused on the optimal implementation of section 1605 in the FAR, *i.e.,* the Councils have attempted to find the balance between domestic-sourcing requirements and simplicity and clarity of implementation, so that the rule does not become so onerous that it does more harm than good to U.S. industry.

2. Applicability of Section 1605 of the Recovery Act

a. Relation to the Buy American Act

There are two main issues raised by respondents with regard to the applicability of the Buy American Act in contracts funded with Recovery Act funds.

i. Does the Buy American Act apply to manufactured construction material used in Recovery Act projects?

Comments: A few respondents contended that the Buy American Act still applies to goods covered by section 1605 of the Recovery Act—that both standards must be met. These respondents objected that the interim rule deviated from existing law and regulations that should still govern the purchase of goods covered by the Recovery Act. According to these respondents, any final rule must, at a minimum, preserve the basic requirements of assembly in the United States and the 51 percent domestic component rule, because the Buy American Act still applies. Another respondent claimed that this rule cannot waive the Buy American Act's component test without additional authority.

Response: The Recovery Act sets out specific domestic source restrictions for iron, steel, and manufactured goods incorporated into Recovery Act construction projects. In many ways, these restrictions mirror the Buy American Act, but there are specific differences (no component test, different standards for unreasonable cost, no exception for impracticable, etc.). The Councils and OMB determined that it was reasonable to interpret section 1605 as including all of the "Buy American—Recovery Act" restrictions that Congress intended to apply to iron, steel, and manufactured goods covered by the Recovery Act, *i.e.,* these goods are not also covered by the Buy American Act. Since Congress was clearly aware of the Buy American Act when creating the Recovery Act domestic source restrictions and exceptions, if Congress had wanted the component test or other aspects of the Buy American Act to apply, they would have included them. Congress incorporated those aspects of the Buy American Act that they wanted to apply, and excluded or modified those aspects that they did not want to apply. The Councils have determined that section 1605 of the Recovery Act supersedes the Buy American Act with regard to the acquisition of manufactured construction materials used on a project funded with Recovery Act funds. Therefore, the component test does not apply to construction material used in projects funded by the Recovery Act.

ii. Does the Buy American Act apply to unmanufactured construction material used in Recovery Act projects?

Comments: Several non-U.S. respondents objected that the interim rule applies the Buy American Act to unmanufactured construction material. One of them stated that the interim rule has expanded the scope of the Recovery Act by way of arbitrary interpretation and constitutes an unjustified limitation of the use of foreign unmanufactured construction materials, given that the use of foreign unmanufactured construction materials is not prohibited by the Recovery Act. A respondent believed that "statutory authority does not exist to extend the provisions required by section 1605 to unmanufactured goods" and asked that this be struck from the final rule. Another objected that the additional 6 percent evaluation factor applied to unmanufactured construction material is only stipulated in the FAR, and should not be permitted under the spirit of the "G20 Statement."

Response: Section 1605 did not address unmanufactured construction material. The interim rule coverage of unmanufactured construction material is not based on extending the coverage of section 1605, but on continuing to apply the Buy American Act to that material not covered by the Recovery Act.

b. Applicability to Construction Projects/Contracts

i. How To Identify a "Construction" Contract

Comments: A respondent wanted to know whether the contracting agency will be required to affirmatively stipulate whether a contract is considered a "construction" contract and require that this language be flowed down to subcontractors.

Response: Construction contracts are easily identifiable by the presence of construction provisions and clauses in the solicitation and contract, such as the clauses prescribed in FAR subpart 36.5 as well as the Buy American Act provisions and clauses for construction contracts in FAR clauses 52.225–9 through 52.225–12 or now the Recovery Act Buy American, FAR provisions at 52.225–21 through 52.225–24. It is the responsibility of the prime contractor to comply with contract clauses and impose on subcontractors whatever conditions are necessary to enable the prime contractor to meet the contract requirements.

ii. Use of terms "contract" and "project"

Comments: Two respondents contended that the interim rule is unclear in several places regarding the scope of coverage because the terms "projects" and "contracts" appear to be used interchangeably.

- FAR 25.602(a) states that "None of the funds appropriated or otherwise made available by the Recovery Act may be used for a project for the construction, alteration, maintenance or repair of a public building or public work * * *"
- FAR 25.603(c), implementing the Trade Agreements Act, states that "For construction contracts with an estimated acquisition value * * *"
- FAR 52.225–21(b)(2) states, "The contractor shall use only domestic construction material in performing this contract * * *."

Response: Construction "project" is often a more inclusive term than construction "contract." Large construction projects may involve more than one construction contract. The term "project" may also be used to denote a segment of a contract, if the funds are clearly segregated. To clarify this meaning, the Councils have added a statement in the policy section at FAR 25.602 and also clarified in the provision and clause prescriptions at FAR 25.1102(e)(2) that the contract must indicate if the Recovery Act provision

and clause only apply to certain line items in the contract.

The scope of this rule is established, in accordance with section 1605(a) of the Recovery Act, as applying restrictions to "a project for the construction, alteration, maintenance, or repair of a public building or public work." The final rule has clarified at FAR 25.602 that the agency determines the scope of the project and conveys this to the contractor through the specified applicability of the Recovery Act provision and clause in the contract.

However, the statute can only be implemented through clauses that go into a specific construction contract. Each contract can only impose requirements applicable to that particular contract. Therefore, the term "contract" is used when the interim rule is addressing a requirement that is specific to a contractor or contract, particularly as used in the provisions and clauses.

c. Applicability to Construction Materials or Supplies

i. Equating "Manufactured Goods Used in the Project" to "Construction Material"

Comments: There were many concerns about the interpretation in the interim rule of the applicability of section 1605 to manufactured goods, namely that the rule equates manufactured goods used in the project to construction material.

A respondent contended that the narrow interpretation of manufactured goods "ignores common sense and well-established precedent." According to the respondent, the rule equates manufactured goods to construction material and limits the applicability to construction materials that are incorporated into a public building or work.

Another respondent stated that the rule should apply to all manufactured goods—not just construction materials, contending that manufactured goods "used in the project" means "all hazmat suits, tool belts, masks, tarps, covers, safety straps, construction clothing, gloves, *etc.* purchased by the contractor as part of doing the work."

A respondent stated that regulations for public works projects must require that all manufactured goods, including textile products, must be manufactured in the United States, as intended by the Recovery Act.

On the other hand, a respondent expressed concern that the perceived requirement that all manufactured products on the construction site are covered is proving disastrous for American equipment manufacturers. This respondent stated that construction equipment manufacturers provide the machines that improve operations and reduce costs of any infrastructure project. The process to verify and prove 100 percent U.S. content of each piece of equipment is onerous.

Some respondents expressed support for the Councils' approach in FAR subpart 25.6 of treating iron, steel, and manufactured goods as another way of describing "construction material: As that term has been understood and applied with respect to 41 U.S.C. 10a–10d in FAR subpart 25.2 and its associated clauses."

Response: One of the goals in implementation of the Recovery Act was to make the definitions and procedures as close to existing FAR definitions and procedures as possible, except where differences are required by the Recovery Act.

Therefore, when applied to a construction contract, FAR subpart 25.6 and the associated construction clauses use the standard definition of "construction material" at FAR 25.003 that is familiar to contractors and contracting officers. There is a long series of Government Accountability Office (GAO) decisions and case law that then can be applied without completely starting over. For use in a construction contract, the Councils interpreted "manufactured goods used in the project" to be comparable to the long-standing definition of "construction material" as an "article, material, or supply brought to the construction site by the contractor or a subcontractor for incorporation into the building or work." Review of the existing case law clarifies the many possible nuances relating to construction material and its delivery to the site. Rather than "ignoring well established precedent," the Councils relied on well-established precedent. The FAR has never applied domestic source restrictions to such items as hazmat suits, tool belts, masks, tarps, covers, safety straps, construction clothing, and gloves, which are used in a construction project by the contractor but are not incorporated into the construction project. Further, the interim rule did not apply the Recovery Act Buy American requirement of section 1605 to equipment used at the construction site, because it is not incorporated into the construction project. These items are not deliverables to the Government, but remain the property of the contractor. The contractor may already have purchased these items before commencement of the contract, and may continue to use them on subsequent contracts. Therefore, their purchase is not generally subject to restrictions in the terms of the contract.

ii. Applicability to Supplies Purchased by the Government

Comment: One respondent expressed concern that the interim rule, in the definition of construction material, stated that manufactured goods that are purchased by the Government are supplies and, therefore, excluded from the definition of manufactured goods, as used in section 1605.

Response: The statement that items purchased by the Government are supplies, not construction material, has been a standard part of the definition of construction material for many years. It is a true statement that items purchased by the Government are not "construction material" as it is defined in the FAR. However, section 1605 does require that all manufactured goods incorporated into the project must be produced in the United States, whether purchased by the contractor as construction material or purchased by the Government as an item of supply. If the Government directly purchases manufactured goods and delivers them to the site for incorporation into the project, such material must comply with the "Buy American—Recovery Act" restriction of section 1605, even though it is not construction material as defined in the FAR. The final rule clarifies this in the policy section. Furthermore, for added clarity, the final rule deletes from the definition of "construction material" in FAR clauses 52.225–21 and 52.225–23 the phrase about items purchased by the Government not being construction material, because it appears to cause confusion and because the information about actions the Government may take is not pertinent to the contractor for performance of the construction contract.

iii. Contractor-Purchased Supplies for Delivery to the Government

Comments: A respondent requested that the final rule clarify that, to the extent purchases of supplies made with Recovery Act funds are not covered as construction material, they are subject to normal Buy American Act/Trade Agreements Act requirements.

Response: Contractor-purchased supplies that are for delivery to the Government, not for incorporation into the project, continue to be covered by the pre-existing FAR regulations on the Buy American Act and trade agreements, as applicable. This rule only applies to construction contracts funded with Recovery Act funds or

supplies purchased by the Government for incorporation into the project.

d. Manufacture vs. Substantial Transformation or Tariff Shift

There were many comments on the issue of manufacture and substantial transformation.

i. Buy American Act and Substantial Transformation

Comments: Several respondents believed that the Buy American Act includes a requirement for substantial transformation. One respondent stated that the rule should use the "long-standing definition" of a domestic manufactured good, *i.e.,* final substantial transformation must occur in the United States. Another respondent stated that the Buy American Act of 1933 includes a substantial transformation test. A respondent also stated that the Buy American Act requires substantial transformation in the United States. The respondent was concerned that the interim rule only requires assembly in the United States.

Response: Whether or not the Buy American Act requires "manufacture" or "substantial transformation" is not directly relevant to this rule, but only might be used as a matter of comparison for interpretation of section 1605. The Councils have determined that the Buy American Act does not apply to manufactured construction material. Many of the respondents, whether contending that the Buy American Act still applies or using the Buy American Act for purposes of comparison and interpretation, have misinterpreted the Buy American Act. The Buy American Act includes the requirement for domestic manufactured goods to be "manufactured" in the United States. This term has been used consistently in the FAR as the first prong of the test for domestic manufactured end products and construction material. There is no substantial transformation test included in the Buy American Act. The term "substantial transformation" only comes into the FAR to implement trade agreements. The rule of origin for designated country end products and designated country construction material requires products to be wholly the product of, or be "substantially transformed" in the designated country. Even under trade agreements, there is no requirement for substantial transformation of products produced in the United States, because U.S.-made end products are not designated country products. Actually, the definition of "U.S.-made end product" allows either "substantial transformation" or "manufacture" in the United States to qualify as a U.S.-made end product, because the Buy American Act has been waived for U.S.-made end products when the World Trade Organization Government Procurement Agreement applies. However, this is not the case for domestic construction material. Even when trade agreements apply, domestic construction material must meet the Buy American requirements of domestic manufacture, not substantial transformation. Therefore, those respondents who argue that the Buy American Act requires substantial transformation are simply wrong.

ii. Should "manufacture" in this rule include the standard of substantial transformation?

Comment: Further elaborating on substantial transformation, two respondents recommended that the Councils should adopt a clear rule defining the concept of domestic manufacture consistent with the "well-established standard" of substantial transformation as the first part of the two-pronged test for domestic construction material. The respondent stated that the rule should not confer domestic status simply as a result of minor processing or mere assembly in the United States. According to these respondents, by not adopting substantial transformation, the interim rule has created ambiguity. These respondents pointed out a clear administrative process in the Federal Government for making substantial transformation determinations. They also stated that U.S. Customs and Border Protection (Customs) considers the totality of the circumstances and makes determinations on a case-by-case basis. The respondents questioned why the interim rule omitted any reference to substantial transformation.

Three respondents recommended allowing either manufacture (perhaps combined with the component test) or substantial transformation. According to one of the respondents, allowing both models to determine when a product has been manufactured in the United States ensures greatest flexibility. This respondent believed that this is only relevant below the Trade Agreements Act threshold, *i.e.,* above the threshold, the requirements defined under those pre-existing regulations would apply.

Response: Section 1605 of the Recovery Act does not require substantial transformation. It requires that manufactured goods be "produced" in the United States. The Councils have interpreted the law to equate "production" of manufactured goods to "manufacture." To the extent that the Recovery Act domestic source restriction is worded consistently with the Buy American Act, it is reasonable to implement in a similar fashion. "Substantial transformation" has never been applied in the FAR to domestic construction material, just to designated country construction material that is subject to trade agreements.

Therefore, the final rule continues to utilize the FAR language that parallels the pre-existing construction contract definition of domestic construction material, requiring manufacture in the United States.

iii. Definition of Manufacture

Comments: Other respondents were concerned about the definition of "manufacture." A respondent stated that the interim rule does not provide a clear definition of what constitutes manufacture, *i.e.,* how to determine whether sufficient activity has taken place in the United States for a material to be considered produced in the United States. Likewise, two respondents noted the various interpretations of "manufacture," *i.e.,* some believe it is similar or identical in concept to substantial transformation under Customs' rules, while others believe it is closer to the Buy American Act—Construction clause test for manufacture. One of these respondents asked that the final rule clarify the definition. Yet another respondent stated that, although the rule does not define "manufacture," the regulations suggest that the test will be similar to the requirement of U.S. manufacture applied under the Buy American Act. This may in some cases be less demanding than the substantial transformation test, which examines whether an article is transformed into a new and different article of commerce, having a new name, character, and use.

Response: The Councils have considered in the past including a definition of "manufacture" in the FAR but did not do so because of the case-specific nature of its application. The definition may be different for canned beans than for an aircraft. However, for those who find the word "manufacture" confusing and cite the long-standing tradition of interpretation of "substantial transformation," there is also a longstanding record of interpretation of "manufacture" under the Buy American Act. (See for example B–175633 of November 3, 1975, which addressed the issue of whether a radio had been manufactured in the United States. The GAO did not find against the Army position that, if the final manufacturing process takes place in the United States, the end product is "manufactured in the United States.")

iv. Tariff Shift

Comments: A respondent proposed that the rules of origin under 19 CFR part 102, currently used for NAFTA country-of-origin determinations, be applied to decisions regarding whether construction materials are considered domestic. According to the respondent, Customs is currently proposing that the CFR part 102 rules (also known as "tariff shift" rules) be applied for all country-of-origin determinations (See **Federal Register** at 73 FR 43385, July 25, 2008). Tariff shift rules consider the Harmonized Tariff Schedule of the United States classification of the article before and after manufacturing. If the classification shifts, then the article takes on a new country of origin.

Response: Companies that contract with the Government are accustomed to the well-established meaning of the term "manufacture" as applied under the Buy American Act and now the Recovery Act.

e. Iron and Steel

i. Similarity to Federal Transportation Laws

Comments: Three respondents pointed out that the section 1605 restrictions on iron and steel are similar to the Recovery Act Buy American requirements within the statutory and regulatory framework of Federal transportation laws (U.S. Department of Transportation highways and transit program), which mandate that 100 percent of the iron and steel used in a project be domestically manufactured and also impose comparable standards of unreasonable cost.

Response: The drafters of the FAR interim rule recognized the similarity to the restrictions applicable to the Federal Transit Administration, and modeled the FAR interim rule restriction on iron and steel after 49 CFR part 661, "Buy America Requirements."

ii. 51 Percent Component Test

Comments: One respondent wanted the FAR to go back to the 51 percent component test of the Buy American Act for what constitutes iron and steel products manufactured in the United States in order to ensure compliance with our international agreements, assist in getting projects started, limit delays, and ensure competition.

Response: Reverting to the 51 percent component test of the Buy American Act to determine what constitutes iron or steel products manufactured in the United States would not fully implement section 1605 of the Recovery Act. Section 1605 singled out iron and steel. In addition to requiring that manufactured construction material be manufactured in the United States, the law requires that the iron and steel also be produced in the United States. If the 51 percent component test of the Buy American Act were sufficient, then it would have been unnecessary to impose section 1605 at all. The Recovery Act could have continued to apply the Buy American Act without revision.

iii. Iron or Steel as a Component of Construction Material That Consists Wholly or Predominantly of Iron or Steel

Comments: One respondent also requested clarification that construction materials (such as welded steel pipe) that are produced in the United States using steel that was rolled in the United States from foreign slab are "produced in the United States" within the meaning of the Recovery Act.

A respondent stated that the FAR rule should allow contractors to utilize imported steel slab as raw material feed stock—and substantially transform that slab in the United States into flat rolled steel (hot rolled, cold rolled, galvanized, *etc.*) products, which in turn are used by other manufacturers to produce a wide variety of construction materials. Absent such an approach, construction material using these steel products could be deemed foreign construction materials, simply because the steel slab from which it was made was imported. According to the respondent, this will result in U.S. buyers shying away from these U.S. manufactured construction materials, thus eliminating U.S. jobs.

Another respondent, a carbon steel finishing mill, was concerned that steel can be either the construction material itself or a component of some other manufactured product (such as welded steel pipe). The respondent noted that a manufactured good may consist of only one component.

One respondent approved of the distinction between "steel used as a construction material" and "steel used in a construction material" but requested clarification of the boundaries of these two categories in the final rule. The respondent proposed that the boundary should be between—

- Steel goods delivered to the construction site directly from a steel mill (or its warehouse distributor) (*e.g.,* structural steel items (H-beams, I-beams, *etc.*), reinforcing rod, and plate); and
- Steel goods that have been further processed from intermediate, non-construction material products produced by a steel mill, into manufactured goods delivered to the construction site.

Alternatively, the respondent offered another definition of "steel used in a construction material"—"all steel goods except steel goods delivered to the construction site directly from a steel mill (or its warehouse/distributor) for use as a construction material."

Response: The Councils agree that a clearer distinction is required for circumstances when the Recovery Act Buy American restriction of section 1605 applies to iron or steel components. The intent of the interim rule was not to draw a line between iron or steel used as a construction material, and iron or steel used in a construction material, as suggested by one respondent, but between construction material that consisted wholly or predominantly of iron or steel and construction material in which iron or steel are minor components. The suggestion that manufactured steel goods not delivered to the construction site directly from the mill should be exempt would not be fulfilling the intent of the law. On the other hand, the requirement that every piece of iron and steel, no matter how miniscule, must be melted and rolled in the United States, would be quite unworkable, and would be counterproductive to the overall intent of the law.

The interim rule separated manufactured construction material into two main categories: Iron or steel used as a construction material and "other" manufactured construction material. The interim rule made clear that manufactured construction material that consisted wholly of iron or steel must be produced in the United States, including all stages of production except metallurgical processes involving refinement of steel additives. It also stated that "other" manufactured construction material would require manufacture in the United States, but imposed no requirement on the components or subcomponents in this category of "other" manufactured construction material.

The interim rule is not clear, however, with regard to treatment of construction material that consists predominantly, but not wholly, of iron or steel. Some respondents assumed that all construction material would fall in the "other" category unless it was wholly of iron or steel. Others interpreted, as was intended, that the "other" category was to cover material which did not consist wholly or predominantly of iron or steel.

The Councils re-examined the requirement of the statute and how best to convey these requirements in the regulations. Because iron and steel are singled out for specific mention in the

statute, the Councils conclude that a primary objective of the Act is to promote the use of domestic iron and steel. The Councils have determined that a clearer way to express the requirements of the law would be to interpret the requirement for iron or steel to be produced in the United States as being in addition to (rather than a subset of) the requirement for all manufactured construction material to be manufactured in the United States. The statute did not include the word "other." All manufactured construction material must be manufactured in the United States. This interpretation supports the requirement that iron or steel, whether or not it has reached the stage of being manufactured construction material, must be produced at all stages in the United States. This is similar to some other domestic source restrictions on particular materials or components such as the restrictions on domestic melting or production of specialty metals at 10 U.S.C. 2533b. The intent of the Councils was to balance full implementation of the law with feasibility of compliance. Therefore, the final rule applies this restriction on domestic production of iron and steel only when the iron or steel is a component of construction material that consists wholly or predominantly of iron or steel. (The respondent was correct that there may be just one component in a construction material).

In view of this policy clarification, the proposal to treat foreign slab as a "component" of other manufactured goods, not requiring production in the United States, is not acceptable, because the resultant construction material consists wholly or predominantly of iron or steel, and allowing foreign slab would not meet the objectives of the law.

The Councils have made changes to the policy at FAR 25.602 to clarify the restriction on the production of iron and steel and have revised the definitions of "domestic construction material" in FAR 25.601 and paragraph (a) of the FAR clauses at 52.225–21 and 52.225–23, specifying that all of the iron or steel in manufactured construction material that consists wholly or predominantly of iron or steel shall be produced in the United States, but the origin of the raw materials of the iron or steel is not restricted.

iv. Iron or Steel as Components of Manufactured Construction Material That Does Not Consist Wholly or Predominantly of Iron or Steel

Comments: Some respondents objected to the provision in the interim rule that the Recovery Act Buy American restriction does not apply to iron or steel used as components of other manufactured goods. One respondent stated that the Recovery Act Buy American requirements of section 1605 must apply to all iron and steel, including all iron and steel components and subcomponents used in manufactured construction material. One respondent believed that this provision of the interim rule creates a loophole, in that the use of foreign steel reinforcing bar (rebar) used in concrete slab would be allowed, because the steel rebar would be considered a component of a manufactured product (the concrete slab).

On the other hand, a different respondent believed that the fact that the regulations permit foreign steel or iron used as components or subcomponents of other manufactured construction material to be considered domestic construction materials as long as the manufacturing is done in the United States is a sound and practical decision. This respondent commented that the rule allows U.S. companies flexibility to prudently source from both American and foreign vendors to manage costs, while promoting U.S. manufacture.

Response: The interim rule would not allow foreign steel rebar (as a component of concrete slab) because the rule applies to construction material brought to the construction site. The steel rebar is brought separately to the construction site and is therefore itself construction material, not a component of the concrete slab, which is poured and formed on the construction site.

As stated in the prior section, iron and steel components are only exempt from the restriction of section 1605 if the construction material does not consist wholly or predominantly of iron or steel.

f. Components

Comments: Three respondents agreed with the interim rule approach of not including a requirement relating to the origin of components. They argue that an expansive and practical definition of manufactured goods is needed to allow the contractor leeway in getting the project done on time and within budget.

Many other respondents strongly argued for inclusion of a "component test," often citing the Buy American Act as a precedent.

- One respondent stated that the costs of all the domestic components in the final product must exceed 50 percent of the cost of all the components.
- A respondent stated that Congress' deliberate inclusion of the term "manufactured goods" was plainly intended to be under the precedent established under the Buy American Act. Yet another respondent stated that the interim rule does not meet the requirements of section 1605 because domestic content requirements for components and subcomponents parts have been omitted. This respondent also objected that the interim rule has ignored a long history of applying a domestic content rule in determining if a good is produced in the United States for purposes of enforcing domestic source restrictions. According to the respondent, OMB acknowledges that the two-part test relied upon is from the Buy American Act, then simply waives the domestic content part of the 1933 Act's text. Desiring an expeditious flow of funding cannot trump the statutory requirement to procure domestically produced goods. Longstanding interpretation of domestic manufactured goods under the Buy American Act also comports with Congressional intent to save and create manufacturing jobs.
- A respondent was disturbed that the interim rule explicitly rejected the use of a component test, one of the minimal Buy American Act standards for rule of origin. The respondent contended that allowing for the use of non-domestic component parts will have a significant impact on the job-creation ability of the stimulus.
- Two respondents stated that the Councils should adopt a clear rule defining the concept of domestic manufacture consistent with the well-established standard of substantial transformation and a 50 percent component content standard (by cost). The FAR should not confer domestic status simply as a result of minor processing or mere assembly in the United States.

Response: The Councils in the interim rule did not, as respondents claim, acknowledge dependence on the two-prong Buy American Act test and then waive the component test. The Councils relied on the difference in wording between section 1605 and the Buy American Act. The preamble to the interim rule specifically stated: "Because section 1605 does not specify a requirement that significantly all the components of construction material must also be domestic, as does the Buy American Act, the definition of domestic construction material under this interim rule does not include a requirement relating to the origin of the components of domestic manufactured construction material" (see **Federal Register** at 74 FR 14624, March 31, 2009). The Buy American Act requires manufacture in the United States "substantially all from articles,

materials, or supplies mined, produced, or manufactured * * * in the United States" (41 U.S.C. 10b). On the other hand, section 1605 only requires the manufactured goods to be "produced" in the United States. If Congress intended the component test to apply, it could have easily so stated in section 1605.

Comments: In fact, a few respondents even suggested carrying the component test further than the Buy American Act interpretation of the 50 percent domestic component test. A respondent stated that statutory language could be interpreted to mean a 100 percent domestic content requirement. Another respondent stated that, if OMB wanted to be aggressive, it could write a rule with an even more stringent component test (*see* Berry Amendment), especially with respect to textile and apparel products.

Response: Even if section 1605 were not silent on the issue of a 100 percent domestic component requirement, it would be almost impossible to comply with such a requirement in this current global economy. It would cause immense difficulty to American manufacturers, and section 1605 does not require it.

Comments: One respondent was confused about the waiver by the Administrator of OFPP of the component test for COTS items because of the technical correction made to FAR 25.001 by the interim rule. The respondent noted that the interim rule amends FAR 25.001(c)(1) by waiving the component test for commercially available off-the-shelf items for all procurements, regardless of whether the procurement is funded with Recovery Act funds.

Response: The interim rule did not introduce the component test waiver for COTS items at FAR 25.001(c)(1). The final rule for that change was published in the **Federal Register** at 74 FR 2713, January 15, 2009, and became effective February 17, 2009. However, the rationale for that waiver may provide support for the decision that the component test is not appropriate for implementation of the Recovery Act. The Administrator of OFPP waived the component test of the Buy American Act for COTS items because "a waiver of the component test would allow a COTS item to be treated as a domestic end product if it is manufactured in the United States, without tracking the origin of its components. Waiving only the component test of the Buy American Act for COTS items, and still requiring the end product to be manufactured in the United States, reduces significantly the administrative burden on contractors and the associated cost to the Government." The FAR procedures for evaluation of foreign offers in acquisitions of supplies covered by trade agreements is predicated on agencies treating offers of U.S.-made end products (*i.e.,* offers that may not be domestic end products that meet the component test of the Buy American Act) more like the agencies treat eligible products (the trade agreements do not apply any component test to eligible products from designated countries). Today's markets are globally integrated with foreign components often indistinguishable from domestic components. The difficulty in tracking the country of origin of components is a disincentive for firms to contract with the Government.

Comments: A number of respondents that agreed with not including the component test for domestic products still requested a definition of "component" in the rule.

Response: There are two basic definitions of "component" in the FAR, at 2.101 and 25.003, and associated Buy American Act clauses. In the final rule, there is no separate definition of component in FAR subpart 25.6, so the definition at FAR 25.003 applies to FAR subpart 25.6. However, for increased clarity, the appropriate definition of "component" has been included in the FAR clauses at 52.225–21 and 52.225–23.

g. Summary Matrix of Requirements for Domestic Construction Material

The following matrix summarizes the requirements for domestic construction material in projects that use Recovery Act funds.

REQUIREMENTS FOR DOMESTIC CONSTRUCTION MATERIAL IN PROJECTS THAT USE RECOVERY ACT FUNDS

Type of construction material	Applicable statute	Production of construction material	Production of iron/steel	Production of other components
Manufactured—wholly or predominantly iron or steel.	Section 1605 of Recovery Act.	Manufacture in U.S.	All processes in U.S. (except steel additives).	No requirement.
Manufactured—not wholly or predominantly iron or steel.	Section 1605 of Recovery Act.	Manufacture in U.S.	No requirement	No requirement.
Unmanufactured	Buy American Act	Mined or produced in U.S.	XXX	XXX.

3. Applicability of International Agreements

a. Trade Agreements

Comments: As provided by section 1605(d), the Recovery Act Buy American provisions must be applied in a manner consistent with United States obligations under international agreements. One respondent requested that the final regulations should ensure compliance with existing international obligations, but did not specify any shortcomings in the interim rule in this regard. Another respondent considered that the interim rule is creating great consternation with our international trading partners and could lead them to retaliate with their own protectionist measures. A third respondent claimed that the interim rule did not ensure consistency with international obligations.

Response: As required by section 1605, the FAR rule provides for full compliance with U.S. obligations under all international trade agreements when undertaking construction covered by such agreements with Recovery Act funds. The new required provisions and clauses implement U.S. obligations under our trade agreements in much the same way as they are currently implemented in non-Recovery Act construction contracts, with one exception. The Caribbean Basin countries are excluded from the definition of "Recovery Act designated country," because the treatment provided to them is not as a result of any U.S. international obligation but is the result of a United States initiative. The new cost evaluation standards do not apply to manufactured construction material from Recovery Act designated countries.

Comments: One respondent stated that, as drafted, the interim rule implied that all construction material from Recovery Act designated countries is exempt from the Recovery Act Buy

American requirements set forth in section 1605 and the Buy American Act. This implication is inconsistent with the law because, according to the respondent, not all Recovery Act designated country construction material is exempt. FAR subpart 25.4 limits the foreign products eligible for equal consideration with domestic offers. Even if end products for resale or set asides for small business are produced in Recovery Act designated countries, for example, they would not be deemed eligible products per FAR subpart 25.4. Likewise, one respondent pointed out that FAR subpart 25.4 does not apply to procurements set aside for small businesses and requested clarification in the final rule on continuation of this policy.

Response: The FAR subpart 25.4 exception for resale of end products is inapplicable to construction contracts.

FAR subpart 25.4 states that it does not apply to acquisitions set aside for small businesses. FAR 25.603(c) has a cross reference to FAR subpart 25.4.

Comments: Two respondents considered that the situation created by the interim rule with regard to sources of iron and steel is unfair. Namely, designated countries have unrestricted ability to provide iron and steel from anywhere, whereas domestic sources must provide iron and steel melted in the United States. According to these respondents, this would incentivize designated country steel firms to stop shipping slabs to the U.S. and to substitute finished construction materials. The result would be a loss of U.S. jobs in both the steel-finishing and construction-material manufacturing sectors.

Response: In its trade agreements, the United States commits to apply to products from designated countries the rule of origin that is used in the normal course of trade between these countries, *i.e.,* "wholly the product of" or "substantially transformed" in the designated country. In projects funded by the Recovery Act, we cannot add new restrictions on the products of our trading partners that are not applied to other procurements covered by our agreements.

Comments: A respondent recommended that the final FAR rule should provide for the use of an inventory accounting methodology to determine the origin of fungible goods that are commingled American and foreign inventories. This respondent noted that NAFTA permits this methodology to avoid unfairly disqualifying companies that produce eligible products but commingle such products in inventories with foreign products.

Response: The Recovery Act does not permit such methodology.

b. G20 Summit Pledge

Comments: The countries of the G20 stated at the summit that they would refrain from raising new trade barriers to trade in goods and services. According to various respondents, the new law and the interim rule, by adding the restrictions on the production of iron and steel and increasing the test for unreasonable costs, raise new barriers to trade, even though the Recovery Act Buy American requirement must be applied consistent with U.S. international obligations. A respondent stated that overly restrictive implementation of the Recovery Act will undermine the ability of the U.S. companies with global supply chains to participate in the Recovery Act. According to a respondent, it will lead to closed markets overseas to the detriment of American exports, products, and jobs.

A respondent stated that ambiguities in the interim rule were open to interpretation by Government agencies on multiple levels. In the absence of examples of permissible procurement from foreign sources, the business community must await test cases to determine whether, for example, the letter of the law in terms of the WTO GPA signatory exceptions to the exclusionary principles will truly apply. The respondent believed that this ambiguity serves as a de facto obstacle to foreign suppliers engaging in commerce or any form of business alliance with American bidders.

A non-U.S. respondent stated that access to the U.S. procurement market has been further limited in areas not covered by the WTO GPA. Their preference would be non-application of the new requirements to European Union member countries.

Two foreign respondents also wanted to emphasize that the United States should uphold the G20 statement in implementing the Recovery Act Buy American provisions. One stated that, for acquisitions below the WTO GPA threshold of $7,443,000 for construction, the new discriminatory procurement requirements would apply in relation to goods from Recovery Act designated countries.

Response: These concerns essentially go back to the requirements of section 1605 of the Recovery Act. The FAR rule must implement the law. Section 1605 provides for application consistent with United States obligations under international agreements. Pledges at the G20 Summit do not constitute international agreements, as contemplated by section 1605. The FAR rule cannot create new exemptions.

4. Other Definitions

a. Construction Material

Comments: Three respondents stated that, in some circumstances, if foreign pieces are delivered to the jobsite and assembled there instead of being delivered as part of an assembled construction material, those pieces would presumably be in violation. The respondents believe that this rule will encourage or force some assemblies to be done offsite in order to maintain compliance. They recommend allowing the contracting officer some level of discretion.

Response: The definition of construction material in the rule as an article, material, or supply brought to the construction site by the contractor or subcontractor for incorporation into the building or work is unchanged from the first sentence of the current FAR 25.003. That is how Government construction subject to the FAR has worked for many years.

Comments: One respondent further objected that the new FAR clause 52.225–23 included a definition of construction material that singles out "emergency life safety systems" as discrete and complete, allowing them to be evaluated as a single and distinct construction material, regardless of how and when the parts or components are delivered to the construction site. The respondent stated that there are numerous other types of systems, such as environmental control communications systems, that are integrated into the building in such a fashion that warrant being treated in a similar manner that the FAR should consider.

Response: This is the current FAR definition of construction material (see, for example, FAR 52.225–9(a)).

b. Public Building or Public Work

Comment: A respondent stated that there is no definition or cross reference for "public building" or "public work."

Response: The interim rule at FAR 25.602 referenced the definition of "public building or public work" at FAR 22.401. For the definition in the final rule, please see FAR 25.601.

c. Manufactured Construction Material/ Unmanufactured Construction Material

Comment: One respondent expressed concern that the definitions of manufactured and unmanufactured create no clear standard for determining

when a good is a domestic construction material.

Response: The standard for determining whether a good is a domestic construction material is not found in the definitions of "manufactured construction material" and "unmanufactured construction material." It is found in the definition of "domestic construction material" at FAR 25.601 and in the policy at FAR 25.602. In the final rule, the Councils have expanded the definition of "domestic construction material" at FAR 25.601 to include the more detailed standards relating to iron and steel that were included in the policy statement.

5. Exceptions

a. Class Exceptions

Comment: One respondent posited that blanket waivers or broad temporary waivers would be appropriate and should be broadly defined in the FAR. Another respondent noted that the statute was changed during conference to include, at paragraph (b), the phrase "category of cases" for which section 1605 would not apply and wondered why the FAR doesn't mention or take advantage of this language.

Response: The Councils note that neither the statute nor the FAR precludes the use of class waivers in appropriate circumstances.

Comments: Four respondents stated that the FAR should include a *de minimis* waiver in order to limit detrimental impacts of a very small-value item preventing a company from providing an entire system on a project. One respondent suggested a waiver for any construction material that costs less than 10 percent of the entire project cost. Another respondent believed that such minimal use should not trigger the 25 percent evaluation factor because such *de minimis* usage will not threaten the commercial viability of relevant U.S. industry. Two respondents used the example of piping where specific gaskets and fittings must be added on site and are not always manufactured domestically.

Response: Because construction material is defined as the article, material, or supply delivered to the construction site, and there is no component test (except for iron or steel), it is not possible for the delivery of an entire system to be considered non-domestic because of a very small value foreign component of the system, as long as the component is not delivered separately to the construction site.

Further, the clarification of "produced in the United States" (FAR 25.602(a)(1)) makes clear that iron and steel components will only be tracked if the construction material is a manufactured construction material that consists wholly or predominantly of iron or steel.

b. Public Interest

Comments: One respondent wanted a nationwide public interest waiver issued to enable Recovery Act funds to be deployed now, when most needed, rather than await publication of "Buy American regulations." The respondent stated that "(t)he U.S. Environmental Protection Agency (EPA) has taken the prudent approach of using the 'public interest' exception to issue a nationwide waiver of the Recovery Act Buy American requirement for State Revolving Loan Fund projects for which debt was incurred between October 1, 2008 and February 17, 2009."

Two respondents noted that the "public interest" exception does not specify criteria for the agency head to use. One of these respondents asked if there are special procedures that should be included in the FAR.

Response: The Councils believe that the first comment is moot, given that the Recovery Act regulations were published in the **Federal Register** at 74 FR 14623, March 31, 2009. Further, the EPA class exception referred to by the respondent was for State Revolving Loan Fund projects, an area that is covered by the OMB guidance, not the FAR.

With regard to the second comment, the Councils note that the language for this exception is modeled on the public interest exception currently in use for the Buy American Act at FAR 25.103(a). The public interest exception may only be authorized by the agency head (with power of redelegation) and is used infrequently. The FAR includes no special procedures so that agency heads retain appropriate flexibility.

Comment: Another respondent wanted to know whether each State uses the same criteria or procedures.

Response: The FAR is not used by State or local governments; it is used by Federal agencies to contract with appropriated funds. Each agency has a unique mission, and it would not be appropriate to require them all to use the same criteria.

Comment: A respondent suggested that the public interest exception be interpreted flexibly, considering economic efficiency and overall quality of goods so that, "even if non-American iron, steel, and manufactured goods may not satisfy the 25 percent rule, they can still be accepted under the public interest exception."

Response: The public interest exception is designed to be used flexibly and only as a last resort when the nonavailability or unreasonable cost exceptions do not fit. However, it is not designed to circumvent the new statutory standards for determination of unreasonable cost of domestic construction material.

c. Nonavailability

Comments: Four respondents queried the nonavailability waiver at FAR 25.603. One of these respondents believed that the nonavailability exception should be modified to require consideration of the geographical scope of the market in which production takes place so that foreign products are not unfairly discriminated against.

Response: The Councils disagree. The statute contained no such provision, and to add one now would contradict the intention of the U.S. Congress in enacting the Recovery Act. The statute provides an exception for nonavailability of domestic manufactured construction material. This does not result in any discrimination against foreign construction material, but actually allows the purchase of foreign construction material when domestic manufactured construction material is unavailable.

Comment: Another respondent recommended that the final rule provide for a time-limited, streamlined process for issuing nonavailability waivers.

Response: The reason for issuing a nonavailability exception is that the items in question are truly not available "in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality." (FAR 25.603(a)(1)). The Councils believe that contracting officers should not unfairly rush the process of determining whether these conditions apply to an item.

Comment: Another point of view expressed by a respondent was that the final rule should require an offeror proposing a nonavailability waiver to provide, in addition to the items already listed, the following: (1) Supplier information or pricing information from a reasonable number of domestic suppliers indicating availability/delivery date for construction materials, (2) information documenting efforts to find available domestic sources, (3) a project schedule, and (4) relevant excerpts from project plans, specifications, and permits indicating the required quantity and quality of construction materials.

This respondent also requested that the contract list all foreign material

used, including construction material from designated countries.

Response: The Councils' intention was to use the same requirements for this exception as have been used for Buy American Act non-availability determinations for some 15 years. It would be an unnecessary burden to list designated country construction material, because section 1605 requires compliance with trade agreements, and there is no restriction on the use of designated country construction material when trade agreements apply.

Comment: A respondent noted that it seems inconsistent, if designated country materials are not considered foreign construction items, not to consider them when making the determinations in FAR 25.603(a) and (b).

Response: Designated country material is considered to be foreign.

d. Unreasonable Cost

Comment: One respondent stated that "it is quite apparent that a preference for offers excluding foreign construction material lacks the necessary legal justification and constitutes an obvious prejudice against foreign construction material."

Response: The Councils disagree. The paragraphs in the solicitation provisions on evaluation of offers (FAR clauses 52.225–22(c) and 52.225–24(c)) clearly state that the preference is for an offer that does not include foreign construction material excepted at the request of the offeror on the basis of unreasonable cost. This does not constitute a prejudice against all foreign construction material. Inclusion of Recovery Act designated country construction material will not cause the Government to discriminate against an offer. This is in accordance with the law, as promulgated by the U.S. Congress and applied consistent with U.S. international obligations.

Comments: Two respondents stated that the evaluation of foreign construction materials, and the authority provided to submit alternate offers with equivalent domestic material, constitutes a prejudice against foreign construction material.

Response: The Councils disagree and note that the FAR is implementing U.S. law. Further, the implementation scheme is fully compliant with U.S. international agreements.

Comments: Two respondents commented that the 25 percent evaluation factor likely renders the unreasonable cost exception moot because it is so high that it will be impossible to meet.

Response: The Councils had no discretion about the requirement to add 25 percent to the contract cost when foreign iron, steel, or manufactured goods are proposed to be used in a construction project or public work. The factor is specifically required by the language of section 1605(b)(3) of Public Law 111–5.

Comment: Another respondent suggested that the table at FAR 52.225–23(d) should include another category entitled "Recovery Act designated country material."

Response: The respondent gave no reason for this suggestion, and the Councils cannot accept the recommendation. The statute provides an exception for unreasonable cost of domestic material, not for unreasonable cost of designated country construction material. The statute requires a comparison of the price differential between domestic manufactured construction material (including iron and steel) and foreign manufactured construction material (other than designated country manufactured construction material). In an acquisition subject to trade agreements, the material that is obtained from designated countries is not part of the evaluation because it is not domestic construction material.

6. Determinations That an Exception Applies

a. Process and Publication

Comments: Two respondents stated that the use of waivers should be encouraged and simplified.

Response: The Councils have made the exception process as streamlined as is possible within the terms of the statute. Agencies already have authority to use class exceptions.

Comments: Two respondents believed that the specific two-week timeframe for publication of a waiver in the **Federal Register** should be replaced with language requiring publication in the fastest practicable manner. In addition, the Office of Federal Procurement Policy (OFPP) requested that a copy of the nonavailability determination be provided to the OFPP Administrator.

Response: The statute specifically called for publication in the **Federal Register** (Pub. L. 111–5, section 1605(c)). However, the law does not set a time frame for such publication. The Councils agree with the respondents that timely publication is desirable, but the **Federal Register** often must accommodate workload priorities that are out of the control of contracting officers. Therefore, FAR 25.603(b)(2) is revised to require the agency head to provide the notice to the **Federal Register** within 3 business days after the determination is made. Except in unusual workload circumstances, this change should result in publication in the **Federal Register** in less than 2 weeks.

The final rule includes, at FAR 25.603(b), a requirement to provide to the Administrator for Federal Procurement Policy and to the Recovery Accountability and Transparency Board a copy of a determination made in accordance with FAR 25.603(a) concurrent with its provision to the **Federal Register**.

Comments: Six respondents demanded that OMB provide full transparency in the process of obtaining waivers of section 1605's application by requiring that all waiver requests be posted publicly on line. Several of these respondents wanted the waiver request to be posted promptly and publicly on line (the internet or *Recovery.gov*); one wanted the waiver request to be posted within 3 days of its receipt; and one respondent wanted waiver requests to be e-mailed to any trade associations and domestic manufacturers desiring to be on an alert list.

Response: While section 1605 does require publication of exceptions made to the requirement to use U.S.-produced iron, steel, and manufactured goods used in the project, there is no requirement in the statute to publish requests for an exception. Therefore, no change is being made to the FAR to introduce such a requirement.

Comment: One respondent considered that FAR 25.604(a) confuses inapplicability with exceptions and appears to refer to one of the exceptions as a rationale for that "inapplicability" determination. The respondent believed that the concept of the Buy American clause not being applicable is distinct from a situation where the Buy American clause may apply, but an exception has been granted.

Response: The FAR language for this case uses the exact wording from the current FAR Buy American Act coverage. Contracting officers are not waiving section 1605 of the Recovery Act or the Buy American Act, but determining whether an exception applies, and then, if an exception does apply, determining that section 1605 of the Recovery Act or the Buy American Act is inapplicable.

b. Requests for Specific Exceptions

Comments: Three respondents stated that the recent addition of commercial off-the-shelf (COTS) items to exceptions from the Buy American Act for construction materials (FAR 25.225–9

and –11) and the exception at FAR 25.103(e) for commercial information technology (IT) should be available for Recovery Act-funded construction projects.

Response: The Councils do not agree. The COTS item exception only exempts COTS items from the component test of the Buy American Act. This rule does not apply a component test to any of the manufactured construction material subject to section 1605 of the Recovery Act except iron and steel. By definition, unmanufactured construction material does not have components.

With regard to the commercial IT exception, it applies only to the Buy American Act. The Recovery Act exceptions are explicitly stated in section 1605 and are not identical to the Buy American Act exceptions.

Comments: Two respondents requested that commercial items, as a category, be exempt from coverage under section 1605.

Response: The Councils decline to make this change, as the Congress did not exempt commercial items from section 1605 applicability.

Comment: One of these respondents also asked that other typically non-construction materials not primarily made of iron or steel be excluded from coverage.

Response: The Councils do not understand the respondent's use of the term "other typically non-construction materials." The Councils have used the standard FAR definition of "construction material" without change. Under this definition, if it is incorporated into a public building or public work, then the material is construction material.

Comment: One respondent recommended that the FAR waive application of section 1605 for all manufactured goods not made primarily of iron and steel.

Response: The Councils decline for the reason that the Congress specifically included manufactured goods in the coverage of section 1605.

Comment: A respondent wanted the Councils to issue a class waiver from the Buy American Act requirements for electronic fluorescent lighting ballasts.

Response: The FAR includes, at FAR 25.104(a), a list of items that have been determined nonavailable in accordance with FAR 25.103(b)(1)(i). A class determination made in accordance with the above reference does not necessarily mean that there is no domestic source for the listed items, but that domestic sources can only meet 50 percent or less of total U.S. Government and nongovernment demand. The respondent is free to make a request for a class determination. In addition, the offeror may request, and the contracting officer may grant, an exception on an individual contract in accordance with FAR 25.603.

7. Exemption for Acquisitions Below the Simplified Acquisition Threshold

Comments: Two respondents requested that the final rule exempt purchases under the simplified acquisition threshold (SAT) from the Recovery Act.

Response: The determination was made under the interim rule that section 1605 of the Recovery Act would apply to all contracts, including those below the SAT (see Interim Rule, Supplementary Information, Section C (see **Federal Register** at 74 FR 14625, March 31, 2009)). The Councils remain committed to this position in order to fully implement the goals of the Recovery Act. Therefore, any project, of whatever dollar value, financed with Recovery Act funds is subject to these limitations.

8. Remedies for Noncompliance

Comments: One respondent requested that the final rule include a safe-harbor provision protecting companies receiving Recovery Act funds without proper notice from the Government or the purchasing company.

Response: The Councils believe that this is unnecessary, given the protections already built into the use of Recovery Act funds. First, any appropriation of Recovery Act funds receives a special designation that identifies it as Recovery Act money. In addition, FAR 4.1501, 5.704, and 5.705, along with the contract checklist issued by the Recovery Accountability and Transparency Board, require contracting officers to indicate, in the solicitation or award, which products or services are funded under the Recovery Act.

Comment: One respondent stated that the regulations must provide adequate remedies, such as debarment, for non-compliance with section 1605. It claimed that only such meaningful remedies can serve to deter misbehavior.

Response: All of the usual remedies available through the FAR or Federal law are equally available as remedies for noncompliance with section 1605 regulations. No additional remedies are needed.

Comment: One respondent recommended replacing the requirement, at FAR 25.607(c)(4), to refer apparent fraudulent noncompliance to "the agency's Inspector General" rather than to "other appropriate agency officials."

Response: This recommendation has been partially accepted. While the agency Inspector General is available for referral of suspected fraud, it is not the only option in this situation. FAR 25.607(c)(4) is revised to include both the agency's Inspector General and other possible officials.

9. Funding Mechanisms

a. Modifications to Existing Contracts

Comments: Three respondents strongly recommended that the Recovery Act limitations should not be applied to task orders issued under Governmentwide Acquisition Contracts (GWACs) or Multiple Award Contracts (MACs).

Response: The Councils cannot make the change requested by these respondents because the Recovery Act restrictions follow the appropriations. Any construction project or public work funded with Recovery Act money must comply with the restrictions in section 1605, whether the contracting vehicle for the project is a contract or task order.

b. Treatment of Mixed Funding

Comments: Seven respondents were concerned that the interim rule failed to provide any clarity about how projects with mixed funding (some Recovery Act funds and other Federal appropriations) would be treated. Several respondents expressed a strong preference for treating mixed-funded projects as not covered by the Recovery Act limitations.

Response: Given that the statute was designed so that the section 1605 limitations are tied to the source of funding, the Councils do not have the option of complying with respondents' preference. Any Federal construction or public works contract effort that is funded by any funds, however miniscule, appropriated by the Recovery Act must, by law, comply with the section 1605 requirements. However, the regulations do provide that a contract may be funded with Recovery Act funds and non-Recovery Act funds if the funds are properly segregated by line item or sub-line item. In addition, contracting officers are required to indicate, in the solicitation or award, which products or services are funded under the Recovery Act. However, if the contracting officer does not properly segregate Recovery Act and non-Recovery funds, then the law requires the mixed-funded line items or contracts to be treated as if they were entirely Recovery-Act funded. (See discussion of "project" at 2.b. above and in the FAR text at 25.602–1(c).)

10. Interim Rule Improper

Comment: One respondent believed it was inappropriate to publish an interim rule, as it deprived interested parties of the right to comment. The need to have rules available as soon as the Recovery Act funds were made available to Federal agencies for obligation, according to the respondent, was not a sufficient justification for the absence of prior public comment.

Response: The Administration directed the Councils to publish an interim rule in order to provide contracting agencies with the necessary direction quickly. In any case, respondents were given an opportunity to comment fully on the interim rule, and each comment has been thoroughly considered by the Councils.

11. Inconsistencies Between This Rule and Pre-Existing FAR Rule and the OMB Grants Guidance

a. Inconsistency With Pre-Existing FAR

Comments: One respondent objected that this rule will require well-intentioned and compliant companies to establish yet more processes and systems (many of which will be largely duplicative of existing Buy American Act/Trade Agreements Act compliance requirements) to comply with the Recovery Act. The respondent claimed that this creates significant cost burdens and delays in construction projects. Another respondent stated that any change in current supply chains made in order to comply with this rule will limit competition, cause delays, and increase costs. A respondent objected to the creation of yet another list of designated countries.

Response: The Councils used pre-existing FAR language and processes to the extent that it was possible to do so and still meet the requirements of the Recovery Act. The Recovery Act also specified the new requirements for iron and steel and the 25 percent contract evaluation factor.

Recovery Act-designated countries were identified from the language of the statute, the Committee report, and consultation with the United States Trade Representative. Caribbean Basin countries were not included as Recovery Act-designated countries because they are not covered by an international agreement.

b. Inconsistency With the OMB Grants Guidance

Comments: Four respondents expressed a strong preference that the final rule should have the closest possible alignment with the OMB guidance governing grants under the Recovery Act.

One respondent noted that the OMB grants guidance includes examples of "public building." The respondent would like to know whether a public building in the FAR is the same as a public building in the OMB guidance.

Response: The Councils agree and note that the final rule was developed in close coordination with OMB grant officials. The Councils point out, however, that grants, financial assistance, and loans are not subject to the Buy American Act. Therefore, the coverage cannot be the same in these two regulations regarding unmanufactured construction material. Further, the OMB guidance applies to all assistance recipients, including States. Trade agreements do not apply uniformly at the State level.

The final revised FAR provisions include the definition from FAR 22.401 and add examples of public buildings and public works from the OMB grants guidance.

It is our understanding that the OMB grants coverage will be conformed to the FAR terminology to use "manufacture" in lieu of "substantially transformed." The Councils and OMB are not aware of any other areas where the OMB guidance and this FAR rule are not aligned.

Comment: One respondent requested that the Councils consider requesting EPA, Federal Transit/Highways Administration, and other agencies that have issued their own guidance to withdraw it.

Response: The Councils decline. There is no reason to request any agency to withdraw contracting guidance that is in compliance with the FAR.

Language in the Recovery Act exempted the Federal Highway Administration (FHA) from section 1605. It is appropriate that FHA maintain separate regulations.

12. Need for Additional Guidance

Comments: Two respondents stated that there is confusion about the scope of applicability of this rule and requested that the FAR more clearly spell out that contracting authorities are obliged to comply with international commitments and request relevant and user-friendly guidance.

Response: The Councils note that changes in the final rule have differentiated projects that are subject to the Recovery Act rules from projects that are subject to existing Buy American Act and trade agreements requirements. The Councils have made it abundantly clear in the final rule and this preamble that Federal agencies must comply with international agreements when conducting procurements for Recovery Act projects that are covered by such agreements.

Further, contracting authorities that do not comply with the FAR, and thereby with international commitments, should be reported and are subject to sanctions.

Comment: One of those respondents thought that the FAR does not explain what regime must be followed in cases where an entity covered by the World Trade Organization Government Procurement Agreement (WTO GPA) conducts procurement jointly with an entity that is not covered by the WTO GPA.

Response: If one entity in a joint procurement is covered by the GPA or another international agreement, but another entity that is also involved in the same procurement is not covered by the GPA or another international agreement, the procurement will be conducted in a manner that ensures that U.S. obligations under international agreements are honored. That means that in such a case, products from Recovery Act designated countries will not be subject to the restrictions of section 1605 of the Recovery Act.

C. Applicability to Contracts at or Below the Simplified Acquisition Threshold

Section 4101 of Public Law 103–355, the Federal Acquisition Streamlining Act (FASA) (41 U.S.C. 429), governs the applicability of laws to contracts or subcontracts in amounts not greater than the simplified acquisition threshold. It is intended to limit the applicability of laws to them. FASA provides that if a provision of law contains criminal or civil penalties, or if the Federal Acquisition Regulatory Council makes a written determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the simplified acquisition threshold, the law will apply to them.

The FAR Council determined, for the interim rule, that it should apply to contracts or subcontracts at or below the simplified acquisition threshold, as defined at FAR 2.101. The public comments received did not cause the FAR Council to modify this position for the final rule.

This is a significant regulatory action and, therefore, was subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

D. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* because it will only impact an offeror that wants to use non-U.S. iron, steel, and manufactured goods in a construction project in the United States. The Councils stated in the interim rule their belief that there are adequate domestic sources for these materials, and the Office of Management and Budget (OMB) guidance M–09–10 issued February 18, 2009, entitled "Initial Implementing Guidance for the American Recovery and Reinvestment Act of 2009," provides a strong preference for using small businesses for Recovery Act projects wherever possible. No comments to the contrary were received from small entities in response to the interim rule.

E. Paperwork Reduction Act

The Paperwork Reduction Act does apply; however, the information collection requirements imposed by the FAR provisions 52.225–22 and 52.225–24 are currently covered by the approved information collection requirements for FAR provisions 52.225–9 and 52.225–11 (OMB Control number 9000–0141, entitled Buy America Act—Construction—FAR Sections Affected: Subpart 25.2; 52.225–9; and 52.225–11). No public comments were received regarding the data elements, the burden, or any other part of the collection.

List of Subjects in 48 CFR Parts 2, 5, 25, and 52

Government procurement.

Dated: August 18, 2010.

Edward Loeb,

Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 5, 25, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 5, 25, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 2—DEFINITIONS OF WORDS AND TERMS

■ 2. Amend section 2.101 in paragraph (b)(2), in the definition "Component", by revising paragraphs (2) and (3); and adding paragraph (4) to read as follows:

2.101 Definitons.

* * * * *

(b) * * *

(2) * * *

Component * * *

(2) 52.225–1 and 52.225–3, see the definition in 52.225–1(a) and 52.225–3(a);

(3) 52.225–9 and 52.225–11, see the definition in 52.225–9(a) and 52.225–11(a); and

(4) 52.225–21 and 52.225–23, see the definition in 52.225–21(a) and 52.225–23(a).

* * * * *

PART 5—PUBLICIZING CONTRACT ACTIONS

5.207 [Amended]

■ 3. Amend section 5.207 by removing from paragraph (c)(13)(iii) the word "Other".

PART 25—FOREIGN ACQUISITION

■ 4. Amend section 25.001 by adding a new sentence to the end of paragraph (c)(4) to read as follows:

25.001 General.

* * * * *

(c) * * *

(4) * * * If the construction material consists wholly or predominantly of iron or steel, the iron or steel must be produced in the United States.

■ 5. Amend section 25.003 by revising the definition "Domestic construction material" to read as follows:

25.003 Definitions.

* * * * *

Domestic construction material means—

(1)(i) An unmanufactured construction material mined or produced in the United States;

(ii) A construction material manufactured in the United States, if—

(A) The cost of the components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Components of foreign origin of the same class or kind for which nonavailability determinations have been made are treated as domestic; or

(B) The construction material is a COTS item;

(2) Except that for use in subpart 25.6, see the definition in 25.601.

* * * * *

■ 6. Revise section 25.600 to read as follows:

25.600 Scope of subpart.

This subpart implements section 1605 in Division A of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5) (Recovery Act) with regard to manufactured construction material and the Buy American Act with regard to unmanufactured construction material. It applies to construction projects that use funds appropriated or otherwise provided by the Recovery Act.

■ 7. Amend section 25.601 by revising the definition "Domestic construction material"; and adding, in alphabetical order, the definition "Public building or public work".

The revised and added text reads as follows:

25.601 Definitions.

* * * * *

Domestic construction material means the following:

(1) An unmanufactured construction material mined or produced in the United States. (The Buy American Act applies.)

(2) A manufactured construction material that is manufactured in the United States and, if the construction material consists wholly or predominantly of iron or steel, the iron or steel was produced in the United States. (Section 1605 of the Recovery Act applies.)

* * * * *

Public building or public work means a building or work, the construction, prosecution, completion, or repair of which is carried on directly or indirectly by authority of, or with funds of, a Federal agency to serve the interest of the general public regardless of whether title thereof is in a Federal agency (see 22.401). These buildings and works may include, without limitation, bridges, dams, plants, highways, parkways, streets, subways, tunnels, sewers, mains, power lines, pumping stations, heavy generators, railways, airports, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, and canals, and the construction, alteration, maintenance, or repair of such buildings and works.

* * * * *

■ 8. Revise section 25.602 to read as follows:

25.602 Policy.

25.602–1 Section 1605 of the Recovery Act.

Except as provided in 25.603—

(a) None of the funds appropriated or otherwise made available by the Recovery Act may be used for a project for the construction, alteration, maintenance, or repair of a public building or public work unless the

public building or public work is located in the United States and—

(1) All of the iron, steel, and manufactured goods used as construction material in the project are produced or manufactured in the United States.

(i) All manufactured construction material must be manufactured in the United States.

(ii) *Iron or steel components.* (A) Iron or steel components of construction material consisting wholly or predominantly of iron or steel must be produced in the United States. This does not restrict the origin of the elements of the iron or steel, but requires that all manufacturing processes of the iron or steel must take place in the United States, except metallurgical processes involving refinement of steel additives.

(B) The requirement in paragraph (a)(1)(ii)(A) of this section does not apply to iron or steel components or subcomponents in construction material that does not consist wholly or predominantly of iron or steel.

(iii) *All other components.* There is no restriction on the origin or place of production or manufacture of components or subcomponents that do not consist of iron or steel.

(iv) *Examples.* (A) If a steel guardrail consists predominantly of steel, even though coated with aluminum, then the steel would be subject to the section 1605 restriction requiring that all stages of production of the steel occur in the United States, in addition to the requirement to manufacture the guardrail in the United States. There would be no restrictions on the other components of the guardrail.

(B) If a wooden window frame is delivered to the site as a single construction material, there is no restriction on any of the components, including the steel lock on the window frame; or

(2) If trade agreements apply, the manufactured construction material shall either comply with the requirements of paragraph (a)(1) of this subsection, or be wholly the product of or be substantially transformed in a Recovery Act designated country;

(b) Manufactured materials purchased directly by the Government and delivered to the site for incorporation into the project shall meet the same domestic source requirements as specified for manufactured construction material in paragraphs (a)(1) and (a)(2) of this section; and

(c) A project may include several contracts, a single contract, or one or more line items on a contract.

25.602–2 Buy American Act.

Except as provided in 25.603, use only unmanufactured construction material mined or produced in the United States, as required by the Buy American Act or, if trade agreements apply, unmanufactured construction material mined or produced in a designated country may also be used.

■ 9. Revise section 25.603 to read as follows:

25.603 Exceptions.

(a)(1) When one of the following exceptions applies, the contracting officer may allow the contractor to incorporate foreign manufactured construction materials without regard to the restrictions of section 1605 of the Recovery Act or foreign unmanufactured construction material without regard to the restrictions of the Buy American Act:

(i) *Nonavailability.* The head of the contracting activity may determine that a particular construction material is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality. The determinations of nonavailability of the articles listed at 25.104(a) and the procedures at 25.103(b)(1) also apply if any of those articles are acquired as construction materials.

(ii) *Unreasonable cost.* The contracting officer concludes that the cost of domestic construction material is unreasonable in accordance with 25.605.

(iii) *Inconsistent with public interest.* The head of the agency may determine that application of the restrictions of section 1605 of the Recovery Act to a particular manufactured construction material, or the restrictions of the Buy American Act to a particular unmanufactured construction material would be inconsistent with the public interest.

(2) In addition, the head of the agency may determine that application of the Buy American Act to a particular unmanufactured construction material would be impracticable.

(b) *Determinations.* When a determination is made, for any of the reasons stated in this section, that certain foreign construction materials may be used—

(1) The contracting officer shall list the excepted materials in the contract; and

(2) For determinations with regard to the inapplicability of section 1605 of the Recovery Act, unless the construction material has already been determined to be domestically nonavailable (*see* list at 25.104), the head of the agency shall provide a notice to the **Federal Register** within three business days after the determination is made, with a copy to the Administrator for Federal Procurement Policy and to the Recovery Accountability and Transparency Board. The notice shall include—

(i) The title "Buy American Exception under the American Recovery and Reinvestment Act of 2009";

(ii) The dollar value and brief description of the project; and

(iii) A detailed justification as to why the restriction is being waived.

(c) *Acquisitions under trade agreements.* (1) For construction contracts with an estimated acquisition value of $7,804,000 or more, also see subpart 25.4. Offers proposing the use of construction material from a designated country shall receive equal consideration with offers proposing the use of domestic construction material.

(2) For purposes of applying section 1605 of the Recovery Act to evaluation of manufactured construction material, designated countries do not include the Caribbean Basin Countries.

■ 10. Amend section 25.604 by revising paragraph (c)(1), and by removing from paragraph (c)(2) "the unmanufactured" and adding "the domestic unmanufactured" in its place.

The revised text reads as follows:

25.604 Preaward determination concerning the inapplicability of section 1605 of the Recovery Act or the Buy American Act.

* * * * *

(c) * * *

(1) *Manufactured construction material.* The contracting officer must compare the offered price of the contract using foreign manufactured construction material (*i.e.,* any construction material not manufactured in the United States, or construction material consisting predominantly of iron or steel and the iron or steel is not produced in the United States) to the estimated price if all domestic manufactured construction material were used. If use of domestic manufactured construction material would increase the overall offered price of the contract by more than 25 percent, then the contracting officer shall determine that the cost of the domestic manufactured construction material is unreasonable.

* * * * *

■ 11. Amend section 25.605 by—

■ a. Revising paragraphs (a)(1) and (a)(2);

■ b. Redesignating paragraphs (b) through (d) as paragraphs (c) through (e);

■ c. Adding a new paragraph (b); and

■ d. Removing from the newly designated paragraph (c) "If two" and adding "Unless paragraph (b) applies, if two" in its place.

The revised and added text reads as follows:

25.605 Evaluating offers of foreign construction material.

(a) * * *

(1) Use an evaluation factor of 25 percent, applied to the total offered price of the contract, if foreign manufactured construction material is incorporated in the offer based on an exception for unreasonable cost of comparable domestic construction material requested by the offeror.

(2) In addition, use an evaluation factor of 6 percent applied to the cost of foreign unmanufactured construction material incorporated in the offer based on an exception for unreasonable cost of comparable domestic unmanufactured construction material requested by the offeror.

(b) If the solicitation specifies award on the basis of factors in addition to cost or price, apply the evaluation factors as specified in paragraph (a) of this section and use the evaluated price in determining the offer that represents the best value to the Government.

* * * * *

■ 12. Amend section 25.607 by revising paragraph (c)(4) to read as follows:

25.607 Noncompliance.

* * * * *

(c) * * *

(4) If the noncompliance is sufficiently serious, consider exercising appropriate contractual remedies, such as terminating the contract for default. Also consider preparing and forwarding a report to the agency suspending or debarring official in accordance with subpart 9.4. If the noncompliance appears to be fraudulent, refer the matter to other appropriate agency officials, such as the agency's inspector general or the officer responsible for criminal investigation.

■ 13. Amend section 25.1102 by redesignating paragraph (e)(2) as paragraph (e)(3); adding a new paragraph (e)(2); and revising the newly designated paragraph (e)(3) to read as follows:

25.1102 Acquisition of construction.

* * * * *

(e) * * *

(2) If these Recovery Act provisions and clauses are only applicable to a project consisting of certain line items in the contract, identify in the schedule the line items to which the provisions and clauses apply.

(3) When using clause 52.225–23, list foreign construction material in paragraph (b)(3) of the clause as follows:

(i) *Basic clause.* List all foreign construction materials excepted from the Buy American Act or section 1605 of the Recovery Act, other than manufactured construction material from a Recovery Act designated country or unmanufactured construction material from a designated country.

(ii) *Alternate I.* List in paragraph (b)(3) of the clause all foreign construction material excepted from the Buy American Act or section 1605 of the Recovery Act, other than—

(A) Manufactured construction material from a Recovery Act designated country other than Bahrain, Mexico, or Oman; or

(B) Unmanufactured construction material from a designated country other than Bahrain, Mexico, or Oman.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 14. Amend section 52.225–21 by—

■ a. Revising the section heading;

■ b. Revising the heading and the date of the clause;

■ c. In paragraph (a) by—

■ 1. Adding, in alphabetical order, the definition "Component";

■ 2. Removing the last sentence from the definition "Construction material"; and

■ 3. Revising the definition "Domestic construction material"; and

■ d. Revising paragraphs (b)(1)(i), (b)(1)(ii), and (b)(4).

The revised and added text reads as follows:

52.225–21 Required Use of American Iron, Steel, and Manufactured Goods—Buy American Act—Construction Materials.

* * * * *

Required Use of American Iron, Steel, and Manufactured Goods—Buy American Act—Construction Materials (Oct 2010)

(a) * * *

Component means an article, material, or supply incorporated directly into a construction material.

* * * * *

Domestic construction material means the following—

(1) An unmanufactured construction material mined or produced in the United States. (The Buy American Act applies.)

(2) A manufactured construction material that is manufactured in the United States and, if the construction material consists wholly or predominantly of iron or steel, the iron or steel was produced in the United States. (Section 1605 of the Recovery Act applies.)

* * * * *

(b) * * *

(1) * * *

(i) Section 1605 of the American Recovery and Reinvestment Act of 2009 (Recovery Act) (Pub. L. 111–5), by requiring, unless an exception applies, that all manufactured construction material in the project is manufactured in the United States and, if the construction material consists wholly or predominantly of iron or steel, the iron or steel was produced in the United States (produced in the United States means that all manufacturing processes of the iron or steel must take place in the United States, except metallurgical processes involving refinement of steel additives); and

(ii) The Buy American Act (41 U.S.C. 10a–10d) by providing a preference for unmanufactured construction material mined or produced in the United States over unmanufactured construction material mined or produced in a foreign country.

* * * * *

(4) The Contracting Officer may add other foreign construction material to the list in paragraph (b)(3) of this clause if the Government determines that—

(i) The cost of domestic construction material would be unreasonable;

(A) The cost of domestic manufactured construction material, when compared to the cost of comparable foreign manufactured construction material, is unreasonable when the cumulative cost of such material will increase the cost of the contract by more than 25 percent;

(B) The cost of domestic unmanufactured construction material is unreasonable when the cost of such material exceeds the cost of comparable foreign unmanufactured construction material by more than 6 percent;

(ii) The construction material is not mined, produced, or manufactured in the United States in sufficient and reasonably available quantities and of a satisfactory quality;

(iii) The application of the restriction of section 1605 of the Recovery Act to a particular manufactured construction material would be inconsistent with the public interest or the application of the Buy American Act to a particular unmanufactured construction material would be impracticable or inconsistent with the public interest.

* * * * *

■ 15. Amend section 52.225–22 by—

■ a. Revising the section heading;

■ b. Revising the heading and the date of the provision;

■ c. Removing from paragraph (a) the word "Other";

■ d. In paragraph (c) by—

■ 1. Adding in paragraph (c)(1) introductory text "in accordance with FAR 25.604" after the word "applies";

■ 2. Revising paragraph (c)(1)(i);

■ 3. Adding in paragraph (c)(1)(ii) "an exception for the" after the words "based on"; and

■ 4. Redesignating paragraph (c)(2) as paragraph (c)(3); adding a new paragraph (c)(2); and revising the newly designated paragraph (c)(3); and

■ e. Removing from paragraph (d)(1) "paragraph (b)(2)" and adding "paragraph (b)(3)" in its place.

The revised and added text reads as follows:

52.225–22 Notice of Required Use of American Iron, Steel, and Manufactured Goods—Buy American Act—Construction Materials.

* * * * *

Notice of Required Use of American Iron, Steel, and Manufactured Goods—Buy American Act—Construction Materials (Oct 2010)

* * * * *

(c) * * *

(1) * * *

(i) 25 percent of the offered price of the contract, if foreign manufactured construction material is incorporated in the offer based on an exception for unreasonable cost of comparable manufactured domestic construction material; and

* * * * *

(2) If the solicitation specifies award on the basis of factors in addition to cost or price, the Contracting Officer will apply the evaluation factors as specified in paragraph (c)(1) of this provision and use the evaluated price in determining the offer that represents the best value to the Government.

(3) Unless paragraph (c)(2) of this provision applies, if two or more offers are equal in price, the Contracting Officer will give preference to an offer that does not include foreign construction material excepted at the request of the offeror on the basis of unreasonable cost of comparable domestic construction material.

* * * * *

■ 16. Amend section 52.225–23 by—

■ a. Revising the section heading;

■ b. Revising the heading and the date of the clause;

■ c. In paragraph (a) by—

■ 1. Adding, in alphabetical order, the definitions “Component”, “Designated country”, “Designated country construction material”, and “Nondesignated country”;

■ 2. Removing the last sentence from the definition “Construction material”;

■ 3. Revising the definition “Domestic construction material”; and

■ 4. Removing from the definition “Recovery Act designated country” paragraph (2) the word “Israel,”;

■ d. Revising paragraph (b);

■ e. Revising paragraph (c)(3);

■ f. Removing from the table heading in paragraph (d) “Foreign and” and adding “Foreign (Nondesignated Country) and” in its place; and

■ g. In Alternate I by—

■ i. Revising the date of the alternate; and

■ ii. Revising paragraph (b).

The revised and added text reads as follows:

52.225–23 Required Use of American Iron, Steel, and Manufactured Goods—Buy American Act—Construction Materials Under Trade Agreements.

* * * * *

Required Use of American Iron, Steel, and Manufactured Goods—Buy American Act—Construction Materials Under Trade Agreements (Oct 2010)

(a) * * *

Component means an article, material, or supply incorporated directly into a construction material.

* * * * *

Designated country means any of the following countries:

(1) A World Trade Organization Government Procurement Agreement (WTO GPA) country (Aruba, Austria, Belgium, Bulgaria, Canada, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Taiwan, or United Kingdom);

(2) A Free Trade Agreement (FTA) country (Australia, Bahrain, Canada, Chile, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Mexico, Morocco, Nicaragua, Oman, Peru, or Singapore);

(3) A least developed country (Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, East Timor, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Laos, Lesotho, Liberia, Madagascar, Malawi, Maldives, Mali, Mauritania, Mozambique, Nepal, Niger, Rwanda, Samoa, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, Tanzania, Togo, Tuvalu, Uganda, Vanuatu, Yemen, or Zambia); or

(4) A Caribbean Basin country (Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, British Virgin Islands, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Netherlands Antilles, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, or Trinidad and Tobago).

Designated country construction material means a construction material that is a WTO GPA country construction material, an FTA country construction material, a least developed country construction material, or a Caribbean Basin country construction material.

Domestic construction material means the following:

(1) An unmanufactured construction material mined or produced in the United States. (The Buy American Act applies.)

(2) A manufactured construction material that is manufactured in the United States and, if the construction material consists wholly or predominantly of iron or steel, the iron or steel was produced in the United States. (Section 1605 of the Recovery Act applies.)

* * * * *

Nondesignated country means a country other than the United States or a designated country.

* * * * *

(b) *Construction materials.* (1) The restrictions of section 1605 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5) (Recovery Act) do not apply to Recovery Act designated country manufactured construction material. The restrictions of the Buy American Act do not apply to designated country unmanufactured construction material. Consistent with U.S. obligations under international agreements, this clause implements—

(i) Section 1605 of the Recovery Act by requiring, unless an exception applies, that all manufactured construction material in the project is manufactured in the United States and, if the construction material consists wholly or predominantly of iron or steel, the iron or steel was produced in the United States (produced in the United States means that all manufacturing processes of the iron or steel must take place in the United States, except metallurgical processes involving refinement of steel additives); and

(ii) The Buy American Act by providing a preference for unmanufactured construction material mined or produced in the United States over unmanufactured construction material mined or produced in a nondesignated country.

(2) The Contractor shall use only domestic construction material, Recovery Act designated country manufactured construction material, or designated country unmanufactured construction material in performing this contract, except as provided in paragraphs (b)(3) and (b)(4) of this clause.

(3) The requirement in paragraph (b)(2) of this clause does not apply to the construction materials or components listed by the Government as follows:

[*Contracting Officer to list applicable excepted materials or indicate* “*none*”.]

(4) The Contracting Officer may add other construction material to the list in paragraph (b)(3) of this clause if the Government determines that—

(i) The cost of domestic construction material would be unreasonable;

(A) The cost of domestic manufactured construction material is unreasonable when the cumulative cost of such material, when compared to the cost of comparable foreign manufactured construction material, other than Recovery Act designated country construction material, will increase the overall cost of the contract by more than 25 percent;

(B) The cost of domestic unmanufactured construction material is unreasonable when the cost of such material exceeds the cost of comparable foreign unmanufactured construction material, other than designated country construction material, by more than 6 percent;

(ii) The construction material is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality; or

(iii) The application of the restriction of section 1605 of the Recovery Act to a particular manufactured construction

material would be inconsistent with the public interest or the application of the Buy American Act to a particular unmanufactured construction material would be impracticable or inconsistent with the public interest.

(c) * * *

(3) Unless the Government determines that an exception to section 1605 of the Recovery Act or the Buy American Act applies, use of foreign construction material other than manufactured construction material from a Recovery Act designated country or unmanufactured construction material from a designated country is noncompliant with the applicable Act.

* * * * *

Alternate I (Oct 2010). * * *

(b) *Construction materials.* (1) The restrictions of section 1605 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5) (Recovery Act) do not apply to Recovery Act designated country manufactured construction material. The restrictions of the Buy American Act do not apply to designated country unmanufactured construction material. Consistent with U.S. obligations under international agreements, this clause implements—

(i) Section 1605 of the Recovery Act, by requiring, unless an exception applies, that all manufactured construction material in the project is manufactured in the United States and, if the construction material consists wholly or predominantly of iron or steel, the iron or steel was produced in the United States (produced in the United States means that all manufacturing processes of the iron or steel must take place in the United States, except metallurgical processes involving refinement of steel additives); and

(ii) The Buy American Act by providing a preference for unmanufactured construction material mined or produced in the United States over unmanufactured construction material mined or produced in a nondesignated country.

(2) The Contractor shall use only domestic construction material, Recovery Act designated country manufactured construction material, or designated country unmanufactured construction material, other than Bahrainian, Mexican, or Omani construction material, in performing this contract, except as provided in paragraphs (b)(3) and (b)(4) of this clause.

■ 17. Amend section 52.225–24 by—

■ a. Revising the section heading;

■ b. Revising the heading and the date of the provision;

■ c. Removing from paragraph (a) the word "Other"; and

■ d. Revising paragraph (c).

The revised text reads as follows:

52.225–24 Notice of Required Use of American Iron, Steel, and Manufactured Goods—Buy American Act—Construction Materials Under Trade Agreements.

* * * * *

Notice of Required Use of American Iron, Steel, and Manufactured Goods—Buy American Act—Construction Materials Under Trade Agreements (Oct 2010)

* * * * *

(c) *Evaluation of offers.* (1) If the Government determines that an exception based on unreasonable cost of domestic construction material applies in accordance with FAR 25.604, the Government will evaluate an offer requesting exception to the requirements of section 1605 of the Recovery Act or the Buy American Act by adding to the offered price of the contract—

(i) 25 percent of the offered price of the contract, if foreign manufactured construction material is included in the offer based on an exception for the unreasonable cost of comparable manufactured domestic construction material; and

(ii) 6 percent of the cost of foreign unmanufactured construction material included in the offer based on an exception for the unreasonable cost of comparable domestic unmanufactured construction material.

(2) If the solicitation specifies award on the basis of factors in addition to cost or price, the Contracting Officer will apply the evaluation factors as specified in paragraph (c)(1) of this provision and use the evaluated cost or price in determining the offer that represents the best value to the Government.

(3) Unless paragraph (c)(2) of this provision applies, if two or more offers are equal in price, the Contracting Officer will give preference to an offer that does not include foreign construction material excepted at the request of the offeror on the basis of unreasonable cost.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket FAR 2010–0077, Sequence 7]

Federal Acquisition Regulation; Federal Acquisition Circular 2005–45; Small Entity Compliance Guide

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Small Entity Compliance Guide.

SUMMARY: This document is issued under the joint authority of the Secretary of Defense, the Administrator of General Services and the Administrator of the National Aeronautics and Space Administration. This *Small Entity Compliance Guide* has been prepared in accordance with section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It consists of a summary of rules appearing in Federal Acquisition Circular (FAC) 2005–45 which amend the FAR. Interested parties may obtain further information regarding these rules by referring to FAC 2005–45, which precedes this document. These documents are also available via the Internet at *http://www.regulations.gov.*

DATES: For effective dates see separate documents, which follow.

FOR FURTHER INFORMATION CONTACT: The analyst whose name appears in the table below. Please cite FAC 2005–45 and the specific FAR case number. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755.

LIST OF RULES IN FAC 2005–45

Item	Subject	FAR case	Analyst
I	Inflation Adjustment of Acquisition-Related Thresholds	2008–024	Jackson.
II	Definition of Cost or Pricing Data	2005–036	Chambers.
III	American Recovery and Reinvestment Act of 2009 (the Recovery Act)—Buy American Requirements for Construction Materials.	2009–008	Davis.

SUPPLEMENTARY INFORMATION:

Summaries for each FAR rule follow. For the actual revisions and/or amendments made by these FAR cases, refer to the specific item number and subject set forth in the documents following these item summaries.

FAC 2005–45 amends the FAR as specified below:

Item I—Inflation Adjustment of Acquisition-Related Thresholds (FAR Case 2008–024)

This final rule amends the FAR to implement section 807 of the Ronald W.

Reagan National Defense Authorization Act for Fiscal Year 2005. Section 807 requires an adjustment every 5 years of acquisition-related thresholds for inflation using the Consumer Price Index for all urban consumers, except for Davis-Bacon Act, Service Contract Act, and trade agreements thresholds. The Councils have also used the same methodology to adjust nonstatutory FAR acquisition-related thresholds in 2010.

This is the second review of FAR acquisition-related thresholds. The Councils published a proposed rule in the **Federal Register** at 75 FR 5716, February 4, 2010.

The effect of the final rule on heavily-used thresholds is the same as stated in the preamble to the proposed rule:

- The micro-purchase base threshold of $3,000 (FAR 2.101) is not changed.
- The simplified acquisition threshold (FAR 2.101) is raised from $100,000 to $150,000.
- The FedBizOpps preaward and post-award notices (FAR part 5) remain at $25,000 because of trade agreements.
- Commercial items test program ceiling (FAR 13.500) is raised from $5,500,000 to $6,500,000.
- The cost or pricing data threshold (FAR 15.403–4) is raised from $650,000 to $700,000.
- The prime contractor subcontracting plan (FAR 19.702) floor is raised from $550,000 to $650,000, and the construction threshold of $1,000,000 increases to $1,500,000.

Item II—Definition of Cost or Pricing Data (FAR Case 2005–036)

This final rule amends the FAR by redefining "cost or pricing data," adding a definition of "certified cost or pricing data," and changing the term "information other than cost or pricing data," to "data other than certified cost or pricing data." The rule clarifies the existing authority for contracting officers to require certified cost or pricing data or data other than certified cost or pricing data, and the existing requirements for submission of the various types of pricing data. The rule is required to eliminate confusion and misunderstanding, especially regarding the authority of the contracting officer to request data other than certified cost or pricing data when there is no other means to determine that proposed prices are fair and reasonable. Most significantly, the rule clarifies that data other than certified cost or pricing data may include the identical types of data as certified cost or pricing data but without the certification. Because the rule clarifies existing requirements, it will have only minimal impact on the Government, offerors, and automated systems.

Item III—American Recovery and Reinvestment Act of 2009 (the Recovery Act)—Buy American Requirements for Construction Materials (FAR Case 2009–008)

This final rule converts the interim rule published in the **Federal Register** at 74 FR 14623, March 31, 2009, to a final rule with changes. This final rule implements section 1605 of Division A of the American Recovery and Reinvestment Act (Recovery Act) of 2009. It prohibits the use of funds appropriated for or otherwise made available by the Recovery Act for any project for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States. Section 1605 mandates application of the Recovery Act Buy American requirement in a manner consistent with U.S. obligations under international agreements. Least developed countries continue to be treated as designated countries per congressional direction. Section 1605 also provides for waivers under certain limited circumstances.

Dated: August 18, 2010.

Edward Loeb,

Director, Acquisition Policy Division.

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